84-1811 (1)

Office - Supreme Court, U.S.
FILED
APR 18 1985
ALEXANDER L. STEVAS,
CLERK

NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term - 1984

JOSEPH AFFLERBACH, MICHAEL COTTON,
JOHN COTTON, HARVEY B. ANNIS &
MURRAY WATSON, Petitioners

v.

UNITED STATES OF AMERICA, Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

JOSEPH AFFLERBACH, In Pro Se
MICHAEL COTTON, In Pro Se
JOHN COTTON, In Pro Se
HARVEY B. ANNIS, In Pro Se
MURRAY WATSON, In Pro Se

1353 Cody
Casper, Wyoming 82604
PHONE: (307) 234-2310

154 pp

QUESTIONS PRESENTED FOR REVIEW

QUESTION I

DID THE CIRCUIT COURT ERR IN FORCING AN ATTORNEY UPON PETITIONERS AGAINST THEIR WILL AND WITHOUT THEIR KNOWLEDGE AFTER GRANTING THEIR MOTION TO PROCEED ON APPEAL IN PRO SE?

QUESTION II

WAS IT PROPER FOR THE APPELLATE COURT TO UPHOLD THE DISTRICT COURT'S DENIAL OF PETITIONERS' MOTION FOR TRANSFER WITHIN THE DISTRICT BASED UPON THE CONVENIENCE OF THE GOVERNMENT ALONE AND WITHOUT ANY DEMONSTRATION IN THE RECORD THAT THE TRIAL COURT GAVE DUE REGARD TO ALL THE FACTORS IN RULE 18 F.R.CR.P.?

QUESTION III

DOES THE I.R.S. HAVE THE RIGHT TO SEIZE PROPERTY INDISCRIMINATELY WITHOUT DUE PROCESS AND TO VIOLATE A SPECIFIC COURT ORDER WITHOUT ANY INTERFERENCE OF SAID PROPERTY OWNERS?

QUESTION IV

WERE PETITIONERS DENIED EFFECTIVE ASSISTANCE OF COUNSEL IN THE DISTRICT COURT?

QUESTION V

WERE THE ESSENTIAL INGREDIENTS OF THE CRIME CHARGED ADEQUATELY PRESENTED TO THE JURY BY THE COURT'S INSTRUCTIONS?

QUESTION VI

DO THE SENTENCES CONSTITUTE CRUEL AND UNUSUAL PUNISHMENT?

TABLE OF CONTENTS

	pg.
QUESTIONS PRESENTED FOR REVIEW	i
TABLE OF AUTHORITIES	iii
OPINIONS BELOW	2
JURISDICTION	3
CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED	4,5,6,7
STATEMENT OF THE CASE	7
REASONS FOR GRANTING THE WRIT	8 - 17
QUESTION I: On Unwanted Counsel on Appeal	18
QUESTION II: On Denial of Transfer Within District	25
QUESTION III: On Illegal Seizure ..	30
QUESTION IV: On Denial of Effective Counsel At Trial	40
QUESTION V: On Jury Instructions	53
QUESTION VI: On Sentences as Cruel & Unusual	56

pg.

APPENDIX 66

A-1: Tenth Circuit Opinion Being Appealed 67

A-2: Revised Dissenting Opinion 99

A-3: Notice to the Court & Supporting Affidavits .. 112

A-4: Tenth Circuit Joint Order for Dismissal of Public Defender and for Petitioners to Proceed In Pro Se 133

A-5: Vara Affidavit 135

A-6: Power of Attorney - AFFLERBACH 141

DECLARATION OF SERVICE 146

TABLE OF AUTHORITIES

pg.

CONSTITUTIONAL LAW

FIRST AMENDMENT 4,57,58

FOURTH AMMENDMENT 4,33,36, 37

FIFTH AMENDMENT 4,22,40

SIXTH AMENDMENT 4,22,24, 52

EIGHTH AMENDMENT 5,63

NINTH AMENDMENT 5,39,40

STATUTORY LAW

18 U.S.C. 2 5,15

18 U.S.C. 111 5,15

18 U.S.C. 924 (c) 6,15,17

Rule 18 - Fed. Rules of Criminal Procedure 6,25,27, 28

28 U.S.C. 1654 7,22

28 U.S.C. 1867(f) 43,52

28 U.S.C. 1254(1) 4

pg.

CASE LAW

Adderley v. Florida, (1966)
385 U.S. 39 60

Anders v. California, (1967)
386 U.S. 738 47

Coker v. Georgia, 433 U.S. 584 63

Coles v. Peyton, 389 F.2d 224 48,49

Dauer v. U.S., (1951) 1819
F.2d 343 56

Du Point v. U.S., (1967) 388
F.2d 39 26

Edwards v. So. Carolina, (1963)
372 U.S. 229 59

Faretta v. California, (1975)
422 U.S. 806 22,23,24

Fischer v. U.S., (1954) 212
F.2d 441 56

G.M. Leasing v. U.S., (1977)
429 U.S. 338 37

Griswold v. Connecticut, (1965)
381 U.S. 479 40

John Bad Elk v. U.S. (1900)
177 U.S. 529 37,40

pg.

Marron v. U.S., (1927) 275 U.S. 192 37

Strauss v. U.S., (1965) 376 U.S. 416 55

Tatum v. U.S., (1951) 190 F.2d 612 55

Terminiello v. Chicago, (1949) 337 U.S. 1 59

U.S. v. Bosch, (1978) 584 F.2d 1113 48

U.S. v. Burns, (1981) 662 F.2d 1378 28

U.S. v. DeCoster, (1973) 487 F.2d 1197 48,49,51

U.S. v. Ferandez, (1973) 480 F.2d 726 26

U.S. v. Ferrone, (1971) 438 F.2d 381 38,40

U.S. v. Johnson, (1956) 238 F.2d 565 46

U.S. v. Lawson, (1982) 670 F.2d 923 26

U.S. v. Lewis, (1974) 504 F.2d 92 27

pg.

U.S. v. Moore, (1973) 483 F.2d 1361 37,40

U.S. v. Virgil, (1970) 431 F.2d 1037 32,34

Womack v. U.S., (1964) 336 F.2d 959 55

OTHER

"The Defective Assistance of Counsel" (1973) by Bazelon - 42 Univ. of Cin. L. Rev. 1 50,51,52

ABBREVIATIONS

ROA	Record On Appeal
POAB	Petitioners' Opening Appeal Brief
TT	Trial Transcript
DN	Docket No.
MTP	Motions Transcript Proceedings
ABA	American Bar Assoc.
ST	Sentencing Transcript

NOTE

All emphasis is Petitioners

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term - 1984

JOSEPH AFFLERBACH, MICHAEL COTTON,
JOHN COTTON, HARVEY B. ANNIS &
MURRAY WATSON, Petitioners

v.

UNITED STATES OF AMERICA, Respondent

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Petitioners above-named, respectfully pray that a Writ of Certiorari issue, to

review the judgment and Order of the United States Court of Appeals for the Tenth Circuit, entered in this proceeding on January 18, 1985.

OPINION BELOW

The Disenting Opinion of the Court of Appeals was withdrawn and was slightly changed in grammer, not context and another Dissent was filed February 12, 1985.

Petitioners were advised that the Original Opinion of January 18, 1985 was the holding Opinion from which to determine the timeliness of their Petition for Writ of Certiorari.

Both the Opinion and revised Dissent, are attached hereto (A-1 & A-2) for this Court's convenience.

On May 26, 1982 all five of the Petitioners were found guilty, in the U.S. District Court for the District of Wyoming,

for impeding I.R.S. agents in carrying out a levy, on the property of HARVEY ANNIS.

JURISDICTION

The Opinion of the U.S. Court of Appeals for the Tenth Circuit, sought to be reviewed, was entered in judgment January 18, 1985.

No Motion for Re-Hearing was filed in the Tenth Circuit, but an Application For Extension of Time In Which To File Petition For Writ of Certiorari was filed with this Court and was granted March 7, 1985 allowing Petitioners up to and including April 18, 1985 to file said Petition.

The Mandates for J. COTTON, M. COTTON, ANNIS and WATSON issued February 28, 1985 but were recalled March 29, 1985. Petitioners bail has been reinstated and continued until further Order of the Tenth Circuit or until there is a decision on their Supreme

Court Petition for Certiorari, whichever is earlier.

This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISIONS & STATUTES INVOLVED

FIRST AMENDMENT

Congress shall make no law...abridging the freedom of speech, or of the press;...

FOURTH AMENDMENT

The right of the people to be secure in their persons, houses papers and effects, against unreasonable searches and seizures shall not be violated, and no warrents shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the... things to be seized.

FIFTH AMENDMENT

no person shall be...deprived of life, liberty, or property, without due process of law;...

SIXTH AMENDMENT

in all criminal prosecutions the accused shall enjoy the right to a speedy and public trial...by an impartial jury of the State and district wherein the crime

shall have been committed, which district shall have been previously ascertained by law, ... and to have the assistance of counsel for his defense.

EIGHTH AMENDMENT

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted.

NINTH AMENDMENT

The enumeration in the Constitution of certain rights shall not be construed to deny or disparge others retained by the people.

18 U.S.C. § 2 provides:

(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

(b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

18 U.S.C. § 111 provides:

Whoever forcibly assaults, resists, opposes, impedes, intimidates, or interferes with any person designated in section 1114 of this title while engaged in or on account of the performance of his official duties, shall be fined not more than $5,000 or imprisoned not more than three years or both.

18 U.S.C. § 924(c) provides:

(c) Whoever --

(1) uses a firearm to commit any felony for which he may be prosecuted in a court of the Unted States, or

(2) carries a firearm unlawfully during the commission of any felony for which he may be prosecuted in a court of the United States, shall, inaddition to the punishment provided for the commission of such felony, be sentenced to a term of imprisonment for not less than one year nor more than ten years. In the case of his second or subsequent conviction under the subsection, such person shall be sentenced to a term of imprisonment for not less than two nor more than twenty-five years and, notwithstanding any other provisions of law, the court shall not suspend the sentence in the case of a second or subsequent conviction of such person or give him a probationary sentence, nor shall the term of imprisonment imposed under this subsection run concurrently with any term of imprisonment imposed for the commission of such felony.

Rule 18, Fed. Rules of Criminal Procedure

Except as otherwise permitted by statute or by these rules, the prosecution shall be had in a district in which the offense was committed. The court shall fix the place of trial within the district with due regard to the convenience of the defendant and the witnesses and the prompt administration of justice.

28 U.S.C.1654

In all courts of the United States the parties may plea and conduct their own cases personally or by counsel as, by the rules of such courts, respectively, are permitted to manage and conduct cases therein.

STATEMENT OF THE CASE

The incident of June 18, 1981 which is the basis of this Petition, was due to an alleged I.R.S. deficiency for $26,000.00 against Petitioner ANNIS. With added fines, penalities and interest it came to $38,073.14 plus an additional $37,361.41 in fines and interest, totalling $75,434.55.

MR. ANNIS had appealed this matter to the U.S. Tax Court, believing it to be an

Art. III Judicial Court[1]. He lost his case in Tax Court and did not appeal it to the Tenth Circuit.

Later, a second case[2] was filed in the U.S. District Court at Casper, Wyoming because MR. ANNIS was only one trustee of said property, not the owner.

The District Court ruled the trust a sham, consequently, MR. ANNIS appealed and it was this case that was pending in the Tenth Circuit[3] at the time of the ques-

---

fn.1 - ANNIS was never told by the I.R.S. or anyone else, that the U.S. Tax Court was a legislative court and that filing as Petitioner in said court was a waiver of a constitutional right to a jury trial under the Seventh Amendment. ANNIS was lied to by the I.R.S. by 'ommission' and was tricked into waiver of a constitutional right. Nor was he advised that by filing in said court that he was to be saddled with the court's 'presumption of correctness' of the Commissioner of Internal Revenue's alleged deficiency.

fn.2 - U.S. v. ANNIS et. al., Case No. 78-105 K.

fn.3 - Case No's. 79-1701 and 79-1702.

tionable, attempted seizure.

Around noon, June 18, 1982, I.R.S. Special Agents Benjamin Baker, Robert Freeland, Mr. Dalrymple and Deputy Sheriff Wushbon and Andrew Tagliavore entered the ANNIS ranch property.

ANNIS, who was alone, observed their four cars approaching his ranch, from the field where he was working, and believing them to be I.R.S. agents and seeing they outnumbered him considerably, ANNIS believed they might promulgate an incident, so they could arrest or even maybe shoot him, so he fled, via the back road, to the ranch of his friend and neighbor, MURRAY WATSON. Then WATSON returned to the ANNIS ranch alone. He saw that they; were tagging personal property items not belonging to ANNIS.

Meantime, back at the WATSON ranch, ANNIS tried to get some legal help by phone,

to no avail.

WATSON demanded that the Sheriff arrest the I.R.S. officials claiming that their activities were illegal, and were in violation of state law*, and of the constitutional rights of the property owners, whose equipment was being carted off.

At that point, WATSON was shown Judge Kerr's Order to search and seize five items.

WATSON then informed the Sheriff and I.R.S. agents, that ANNIS had the case pending in the Tenth Circuit. He further explained that some of the equipment did not belong to ANNIS and that a $20,000 Massey-Ferguson tractor belonged to WATSON and had been wrongfully tagged, WATSON expressed concern that his tractor would be damaged by the manner in which it had been attached for

---

*Wyoming Stat. 6-1-303, 6-3-303, 6-3-407, 6-3-402(a&c), 7-7-101.

towing, and I.R.S. Agent Baker said WATSON could have about an hour to show proof of ownership of the machinery. WATSON then returned home, to get said ownership proof.

WATSON had also seen other people's property[4] being tagged while he was on the ANNIS ranch, so he called to notify those people and called his Congressman, the Sheriff's Office, and others for peaceful help but to no avail because it was the noon hour, nor could he locate the man with his records, who was in Denver.

MR. ANNIS was still at MR. WATSON'S home, but later returned to his own ranch, with JOHN and MICHAEL COTTON and AFFLERBACH.

After about half an hour on the alleged

---

fn.4 - There was steam and carpet cleaning equipment belonging to MICHAEL and JOHN COTTON (TT-Vol.II 276, 313); a Lincoln arch-welder belonging to AFFLERBACH (TT-Vol.II-284; 313-14); and other property not belonging to ANNIS (TT-Vol.II-262-64).

'ANNIS property,' Deputy Wushbon noticed a couple of pick-ups pulling up, down at the main road entrance and thought there might be a crowd gathering and suggested they all leave, so they began to exit in their four vehicles.

Government witnesses testified that a 'roadblock' was formed by Petitioners' two trucks, which was denied by Petitioners, who claimed that other vehicles were able to pass their vehicles and enter the highway. The truck which <u>did</u> obstruct the road, was the truck which the Mason Wrecker Service had there to haul the tractor away for the Government.

Deputy Wushbon drove ahead and stopped the Government cars and the others got out of the pick-up trucks and a heated discussion ensued as to the legality of the seizure. Petitioners wanted time to pursue

a court hearing to determine their rights in the matter.

Government witnesses stated that it was at this time that JOHN COTTON pointed his shotgun at Special Agent Freeland, about two feet away.

MICHAEL COTTON was described as carrying a Colt AR-15, held at 'port-arms' about 20 or 30 feet away.

ANNIS was also carrying a holster gun which was snapped closed in its holster, because he had been working in the irrigation fields, where there were troublesome raccoons.

At no time did ANNIS unsnap the holster or draw the gun.

WATSON was not armed at all. However, AFFLERBACH did point a shotgun in the direction of Deputy Wushbon and the I.R.S. agents.

Deputy Wushbon and Special Agent Freeland were also armed but did not draw their guns, however, Freeland aggravated the situation and Deputy Wushbon told him to 'back off.'

Finally an agreement was reached whereby Petitioners put their guns away on condition that the equipment be returned. No shots were fired at anyone and no one was harmed.

The confrontation lasted approximately twenty minutes.

No further seizure attempt was made.

On September 4, 1981, a two-count indictment was filed against the five Petitioners, based on the incident which occurred on June 18, 1981, at the ANNIS ranch, outside Casper, Wyoming.

Count I, charged Petitioners with

violation of 18 U.S.C. 111 and 18 U.S.C. 2, forcibly interfering with, or assualting federal officers, in the performance of their official duties.

Count II charged all but MR. WATSON with the use of a firearm, in the commission of a felony in violation of 18 U.S.C. 924(c).

MR. AFFLERBACH was represented by a public defender, Douglas Moench, of Cheyenne, Wyoming.

The other Petitioners herein, were represented by a private attorney, William Norman, of Casper, Wyoming.

Various pre-trial motions were filed in behalf of the Petitioners and a hearing was held on them before Judge Brimmer on April 2, 1982, in Cheyenne, Wyoming about 200 miles from Casper.

Trial was held May 25 and 26, 1982 in

Cheyenne, Wyoming unexpectedly, for Petitioners and their counsels, believed they were going for a hearing, not a trial.

Judge David K. Winder of the District of Utah presided at the trial.

The jury returned with the following verdicts: AFFLERBACH, and JOHN and MICHAEL COTTON were found guilty; as charged in Counts I & II. ANNIS and WATSON were found guilty of the lesser included offense under Count I, of forcibly interfering with a federal officer without the use of a deadly weapon, but both were found not guilty on Count II.

Petitioners were sentenced on July 16, 1982. AFFLERBACH was sentenced to seven years imprisonment on Count I pursuant to 18 U.S.C. 4205(b)(2), followed by; five years probation on Count II. JOHN COTTON was sentenced to two years imprisonment pursuant to

sec. 4205(b)(2) supra, on Count I, followed by five years probation on Count II. MICHAEL COTTON was sentenced to eighteen months imprisonment on Count I, followed by four years probation on Count II. Petitioners ANNIS and WATSON were each sentenced to three years probation on Count I, of which three months was to be served in a jail type setting.

All Petitioners filed timely Notices of Appeal and were released on appeal bonds.

Petitioners proceeded on appeal, In Forma Pauperis.

The Tenth Circuit Opinion, which was filed January 18, 1985 affirmed the convictions, but the probation sentences received by AFFLERBACH, J. COTTON, and M. COTTON under 18 U.S.C. 924(c), were vacated.

REASONS FOR GRANTING THE WRIT

QUESTION I

DID THE CIRCUIT COURT ERR IN FORCING AN ATTORNEY UPON PETITIONERS AGAINST THEIR WILL AND WITHOUT THEIR KNOWLEDGE AFTER GRANTING THEIR MOTION TO PROCEED ON APPEAL IN PRO SE?

Petitioners believe that the Circuit Court[5] has so far departed from the accepted and usual course of judicial proceedings, as to call for an exercise of this Court's power of supervision, as per its Rule 17. The question is substantial.

Petitioners had private counsel in the District Court,[6] but were allowed to proceed in forma pauperis on appeal and a Public Defender, Vicki Mandell King, was appointed. After the submission of her draft of the opening brief, Petitioners were

---

fn.5 - U.S. Court of Appeals for the Tenth Circuit.
fn.6 - U.S. District Court for the District of Wyoming.

very dissatisfied with her pro-government tone and her overall approach to the appeal grounds. Petitioners were unanimous in deciding to relieve themselves of Ms. King's services and go Pro Se.

Shortly thereafter, on April 15, 1983 Petitioners received a copy of Ms. King's Letter of intent to file her brief, in the Circuit Court.

On April 16, 1983 Petitioners filed with the Circuit Court, their Notice to the Court of Dismissal of Counsel (A-3), including their letter to Ms. King and supporting Affidavits.

On April 21, 1983 she filed her Opening Brief.[7]

On April 26, 1983 Ms. King filed a

---

fn.7 - This is one of the briefs on which the Tenth Circuit based its opinion, which Petitioners are now appealing to this Court.

Motion To Withdraw from the case which was granted May 19, 1983.

On May 19, 1983, the Circuit Court granted Ms. King's Motion to Withdraw and also granted Petitioners Motion to represent themselves, pro se, in a Combined Order (A-4).

Petitioners, based upon the Tenth Circuit's Order (A-4), of May 19, 1983 believed that Ms. King's 'opening brief' was then void for all intents and purposes.

Petitioners filed their opening brief, December 18, 1983,[8] which the Government answered and to which, Petitioners replied. These are the only briefs, that should have been considered by the Circuit Court.

---

fn.8 - There was a delay caused by the time it took for the Tenth Circuit to get a "miscellaneous file" to Petitioners so they could write their opening brief. They could not proceed without it.

Petitioners were astounded to read on the Tenth Circuit's Opinion,

> "Submitted on the briefs.
>
> Michael G. Katz, Federal Public Defender, Vicki Mandell-King, Assistant Public Defender, Denver, Colorado, for Defendants-Appellants." (A-1, P.2).

Petitioners never even saw any; "reply" brief from Ms. King. There was no way; the Public Defender could represent Petitioners when they had made, in writing, a conscious, knowing waiver of her services and had been granted the right to proceed on appeal, In Pro Se, by the Tenth Circuit. Petitioners had no way of knowing that the briefs of a lawyer, whose services had been dispensed with, were going to be the basis of the Circuit Court's Opinion in their case or they would have made further objections. Petitioners were never given any notice that the Public Defender's briefs were to be

considered by the Court.

No court, can force a lawyer upon a defendant, against their will. The right of self-representation has been protected since 1789,[9] and is codified today as 28 U.S.C. 1654. No question about it. This right has been violated, greatly predjuciing Petitioners' case.

> "In Adams v. United States ex rel. McCann, 317 U.S. 269, 279, the Court recognized that the Sixth Amendment right to the assistance of counsel implicitly embodies a "correlative right to dispense with a lawyer's help." Faretta v. California, 422 U.S. 806, 814 (1975)

The Sixth Amendment must apply to appeal, as well as to the trial court, otherewise there would be a denial of equal protection of the law. 5th Am., U.S. Const. Ms. Mandel-King was an 'unwanted' counsel

---

fn.9 - Judiciary Act of 1979, sec. 35, 1 Stat. 73, 92.

and,

> "An unwanted counsel 'represents' the defendant only through a tenuous and unacceptable legal fiction." Faretta supra, p. 821.

Petitioners believe that their briefs presented their case far more effectively, than the draft of the Public Defender's Opening Brief, which they read and refused to proceed upon. (A-3)

> "To force a lawyer on a defendent can only lead him to believe that the law contrives against him. Moreover, it is not inconceivable that in some rare instances, the defendant might in fact present his case more effectively by conducting his own defense. Personal liberties are not rooted in the law of averages The right to defend is personal. The defendant, and not his lawyer or the State, will bear the personal consequences of a conviction. it is the defendant, therefore, who must be free personally to decide whether in his particular case counsel is to his advantage." Faretta, supra. p.834.

Petitioners were deprived of their con-

stitional right to conduct their own defense on appeal. 6th Am. U.S. Const.

> "In forcing Faretta under circumstances, to accept against his will a state-appointed public defender, the California courts deprived him of his constitutional right to conduct his own defense. Accordingly, the judgment before us is vacated, and the case is remanded for further proceedings not inconsistent with this opinion." Faretta, supra, p.836

Petitioners believe this Court should go no further in the reading of this appeal, but should stop here, vacate the Opinion and remand this case back to the Tenth Circuit and order them to issue an Opinion based upon Petitioner's briefs alone and the Answering brief of the U.S. Attorney Richard A. Stacy, with no consideration whatsoever allowed to the briefs of an attorney who had been dismissed from the case, by Court Order.

QUESTION II

WAS IT PROPER FOR THE APPELLATE COURT TO UPHOLD THE DISTRICT COURT'S DENIAL OF PETITIONERS' MOTION FOR TRANSFER WITHIN THE DISTRICT BASED UPON THE CONVENIENCE OF THE GOVERNMENT ALONE AND WITHOUT ANY DEMONSTRATION IN THE RECORD THAT THE TRIAL COURT GAVE DUE REGARD TO ALL THE FACTORS IN RULE 18 F.R.CR.P.?

The decision of the Tenth Circuit conflicts with the decisions of other Courts of Appeals as to the proper interpretation of Rule 18, F.R.CR.P. The question is substantial.

The Rule 18 motion first raised in District Court, was denied "for security reasons" alone. (A-1,p.5)

The alleged crime took place outside Casper, Wyoming but trial was moved to Cheyenne, strictly for the convenience of the court.

At the hearing of said motion in Cheyenne, the Court said:

"THE COURT: The problem in trying a case in Casper is that the courthouse there is not as secure as this courthouse. The marshal's personnel are all right here. For these reasons the trial will be here.

Let's take your next motion. ..." from: ROA-Vol. VIII-MTP

The Tenth Circuit upheld the District Court, relying only upon U.S. v. Lawson, (10th Cir. - 1982) 670 F.2d 923, 926.

Petitioners find that the Fifth, Sixth and Eleventh Circuits have held differently. (Also see: U.S. v. Fernandez, (2d Cir.-1973) 480 F.2d 726, 730)

Fifth Circuit:

"...it is the public policy of this Country that one must not arbitrarily be sent, without his consent, into a strange locality to defend himself against the powerful prosecutorial resources of the Government." DuPoint v. United States, (5th Cir.-1967) 388 F.2d 39, at 44.

Sixth Circuit:

> "Indeed, a 1966 amendment of Fed. R. Crim. P. 18...recognized that the presence of venue at a particular place is controlled by numerous factors, e.g. proximity of the defendant's residence, proximity of witnesses and counsel, docket conditions,...and proximity of records and documents. ...
>
> ...Trial judges have wide discretion...However, that discretion cannot be used as an excuse not to give "due regard to the convenience of the defendant and the witnesses" in fixing the place of trial." U.S. v. Lewis, (6th Cir.-1974) 504 F.2d 92, at 97, col. 2

Eleventh Circuit:

> "...in this case, defendants objected by appropriate motion addressed to the discretion of the trial court. They were entitled to have the exercise of that discretion be within the ambit of Rule 18...
>
> ...
>
> We think that a district judge's exercise of discretion resulting in a trial in an environment alien to the accused over a proper objection must be supported by a demonstration in

> the record that the judge gave due regard to the factors now incorporated in Rule 18. The record in this case does not contain such a demonstration. ...considerations to outweigh such factors ... should be set forth in findings that are sufficiently detailed to allow review." U.S. v. Burnes, (11th Cir.-1981) 662 F.2d 1378, at 1383.

No such findings were ever filed by; the District Court, in Petitioners' case.

The Burns Court dealt with the lower court's one consideration of the Speedy Trial Act, which is not at issue here, nevertheless, the "one consideration" ruling on "security reasons" in Petitioners' case, parallels the Burns case. Neither court considered the other aspects of Rule 18. The Burns Court considered this reversible error (at 1383) and consequently reversed and remanded for new trial (at 1385).

Further, the Tenth Circuit states in its Opinion (A-1, p.6) that,

"A defendant must allege "specific prejudice" resulting from the court's refusal to transfer."

While the Public Defender's brief on which the Opinion is based, does not allege any such prejudice, Petitioners' brief does.

"Where all Appellants and one Attorney reside in Casper, where Mr. Moench (fn.-3) joined in the motion for transfer to trial to Casper, where most of the witnesses resided in Casper, and where the trial court failed to give consideration to the convenience of the Appellants and the witnesses. Appellants urge the court erred in denying the motion to transfer the trial to Casper, which necessitated a 400 mile round trip for each appearance in court, motel bills for four defendants and their counsel, meals, gas, and all other attendant, incidental expenses such as secretarial help, xerox copies etc., which expenses and inconvenience constrained the defense to a bare minimum. It also denied Appellants the support of their family and friends, thereby placing an undue burden upon Appellants and their counsels, and prejudicing their cases. Also see TT-Vol.I, p.28, ln3 to 5."

While Petitioners did not use the words, "alien environment" or "strange locality", they believe they did describe the condition in their alleging of prejudice. But the worst possible prejudice to their case was the financial burden of conducting a defense two hundred miles from home. Petitioners were simply unable to provide more than a bare minimum defense, against the powerful financial and other resources, of the government, due to having to conduct their defense,so far away.

QUESTION III

DOES THE I.R.S. HAVE THE RIGHT TO SEIZE PROPERTY INDISCRIMINATELY WITHOUT DUE PROCESS AND TO VIOLATE A SPECIFIC COURT ORDER WITHOUT ANY INTERFERENCE OF SAID PROPERTY OWNERS?

Petitioners believe that the Circuit Court has so far departed from the accepted and usual course of judicial proceedings, by ignoring their Pro Se briefs as to call for

an exercise of this Court's power of supervision.

Further, Petitioners belive that the Tenth Circuit is in conflict with the decision of other Courts of Appeals. The question is substantial.

Again, Petitioners disavow the Public Defender's brief, on which basis, the Tenth Circuit ruled in this matter. Said brief should not be recognized as part of the record.

The issue of illegal seizure, was first raised in District Court, in a Motion To Dismiss, which was denied by Judge Brimmer, April 2, 1982, recused himself April 30, 1982 and was replaced by Judge David K. Winder.

Upon a renewal of the motion, Judge Winder remarked,

"I'm not going to overrule

> Judge Brimmer on something he's done." POAB-p.26 and also TT-Vol. I, p.19, ln.2-3.

Since Judge Winder came to the bench with his mind already made up, any renewed motions were mere exercises in futility, and a denial of due process.

The only case cited by; the Circuit Court's Opinion on this issue, was U.S. v. Virgil, (10th Cir.-1970) 431 F.2d 1037, 1042, which says,

> "A bystander, * * * has no right to intervene if there is reason for him to be aware that the arrest is being made by a peace officer * * ." Virgil

Petitioners believe that the cases are not parallel. In no way can an armed I.R.S. agent be considered a "peace officer". Nor were Petitioners to be compared with "bystanders", when they had an interest in the property that was being seized without a warrant. Said warrant did not mention any

property other than that of ANNIS. The Court Order called for the seizure only of (1) one dump truck, (2) two stack-rack trucks, (3) one hay bailer, (4) two house trailers, (5) one travel trailer and (6) other varied farm implements. No. 6 is obviously overbroad and lacking in specificity.

Nowhere does the Varra Affidavit (A-4) give a Basis for the reliability of Revenue Officer Tagliavore. Nowhere does it state that the items listed belong to HARVEY ANNIS, nor does it allege that Mr. Tagliavore made any search of records to determine ownership of the listed property. The Affidavit does not describe in detail, such as physical description, manufacturer, serial no. or any other such specific, identifying information and is therefore unconstitutional, under the Fourth Amendment.

Also, the Virgil Court, openly admits that,

> "The question of whether a third party may intervene where the peace officer is using violent, excessive and unnecssary force likely to result in serious injury to the person sought to be arrested is not here presented and we do not decide it." U.S. v. Virgil, (10th Cir.-1970) 431 F.2d 1037, at 1043.

The facts remain that, (1) the I.R.S. lied to Judge Kerr in order to obtain their search warrant, by failing to tell the court that a 'Release of Levy' had been issued to Petitioner HARVEY ANNIS for property and no subsequent liens had been issued, denying ANNIS due process; furthermore, Revenue Officer Tagliavore's affidavit for the seizure Order and his testimony in court seem in conflict. He testified, as witness for the prosecution, that prior to the attempted seizure, he had made a record search

at the County Clerk's Office in Natrona County (TT-Vol.I-p.204), as to the ANNIS property, but there was no reference to this in his Affiavit on which the seizure Order of Judge Kerr was based. The 'Data Sheet' accompanying the seizure Order states at the very bottom;

> "How does revenue officer know above informtion: Observed property by driving by; the farm on June 17, 1981."

This was just below the listed items to be seized. These items were not all observable from the road.

Based upon the information 'observed' by Mr. Tagliavore, as told to Mr. Robert J. Varra, district court Judge Kerr, on June 17, 1981, issued an Order permitting federal agents to enter premises of Appellant ANNIS within ten days and to seize the items listed in the Affidavit.

(2) the affidavit of R. J. Varra, I.R.S. agent, in support of the request for a search and seizure Order was heresay and therefore insufficient, because the heresay reasons for affidavits, did not apply to Mr. Varra. The only reasons for heresay affidavits, is the unavailability of the person with the information to sign the affidavit, or to protect the identity of an informer. Neither applies here; (3) the I.R.S. was seizing property not listed in the search and seizure Order and (4) it is the policy of the I.R.S. to seize everything in sight and then let the owners come forth and prove what's theirs, a blatant violation of the Fourth Amendment. (See: TT-Vol.I, p.213, ln.8 to p.214, ln.6); (5) there was a show of undue force by four cars of armed men, against Petitioner ANNIS, who lives alone on his ranch.

Searches and seizures that govern tax laws are controlled by the Fourth Amendment, which does not provide a 'tax enforcement' exception. G.M. Leasing Corp. v. U.S., (1977) 429 U.S. 338, 355. As to what is taken, nothing is left to the discretion of the officer executing the seizure. Marron v. U.S., (1927) 275 U.S. 192. The I.R.S. ignores this principle.

Further, where a 'peace' officer does attempt an illegal seizure, of a person, that seizure (arrest) may be resisted with such foce as is necessary to prevent it, even though he knows the seizure is being made by 'peace' officers. John Bad Elk v. U.S., (1900) 177 U.S. 529 and also U.S. v. Moore (9th Cir.-1973) 483 F.2d 1361, 1364. If the 'peace' officer case law applies to I.R.S. agents, then that case law must be considered in its totality, not only in

part.

Testimony and evidence challenging the Order and seizure, was severely restricted at trial.

In U.S. v. Ferrone, (3rd Cir.-1971) 438 F.2d 381 the court noted that the circumstances of an attempted seizure may; be such as to present justifiable provocation to a reasonable man, mitigating the offense of resistance. Petitioners believe that four cars of armed men for a simple task of tagging and removing items, was excessive force, in addition to which the I.R.S. violated their own court order by tagging property that was not listed and which did not belong to ANNIS. Taken together, Petitioners believe that these acts provided sufficient provocation to reasonable men. Further, Petitioners FIRMLY believe, that had they gone unarmed to meet the I.R.S.,

they would have been gunned down, with no witnesses, which has happened before with the I.R.S., in other cases which have been reported in the newspapers. They went armed, in self-defense.

Petitioners used no more force than was necessary to protect themselves and to resist the illegal seizure of <u>their</u> property and then, only after several attempts to secure legal help and to contact the sheriff, failed, because of the noon hour, when, no one was available. No shots were fired at anyone and no one was harmed, during the twenty minute confrontation, but Petitioners were later indicated, tried and found guilty.

Petitioners believe that under the circumstances, their actions were justifiable and within the law, under their common law right of self-help, secured in the <u>Ninth</u>

Amendment an their Fifth Amendment right not to be deprived of their property without due process. See: J. Goldberg's concurring opinion on unwritten comnmon law rights under the Ninth Amendment, in Griswold v. Conn., (1965) 381 U.S. 479 (P.O.A.B. - p.29-30).

The 10th Circuit is in conflict here, with the 3rd Circuit (re: Ferrone, supra) and the 9th Circuit (re: Moore, supra) as well as with this Supreme Court (re: John Bad Elk, Supra.)

QUESTION IV

WERE PETITIONERS DENIED EFFECTIVE ASSISTANCE OF COUNSEL IN THE DISTRICT COURT?

Petitioners believe that the Circuit Court has so far departed from the accepted and usual course of judicial proceedings, as to call for an exercise of this Court's power of supervision, as per its Rule 17.

Petitioners also believe the Tenth Circuit's criteria is in conflict with the Fourth Circuit and the D.C. Circuit as set forth herein.

Petitioners believe that because the Public Defender's briefs did not introduce this question, which is embarrassing to so many people, the Tenth Circuit chose to ignore Petitioners arguments, while addressing the issue. It's a very confusing state of affairs.

The complaint of alcoholism against Counsel William Norman, by Petitioners J. COTTON, M. COTTON, WATSON and ANNIS was first raised to J. AFFLERBACH's attorney, Douglas Moench at trial, in Cheyenne, when it had become blatant.

Mr. Norman constantly drank throughout the two-day trial, and was not only bleary-eyed, but toward the latter part of the

trial, his speech was also slurred. His mind could not have been clear. His condition was obvious and the Court could not have failed to notice.

Petitioners did not know what to do and they complained to Mr. Moench, looking for direction. Apparently Mr. Moench didn't want to rock the boat with such a distasteful issue and he sluffed off Petitioners complaint. They didn't know what to do, and so, did nothing further.

Reading the Tenth Circuit's Opinion on this issue, one would be led to believe that Petitioners main compaint centered around the filing of motions, but this is not so.

The Opinion says that "the skill, judgment and diligence of a reasonable competent defense attorney" was established by the trial record, but Petitioners disagree. More than the trial record must be reviewed,

but even the trial record shows that Mr. Norman not only didn't object to the use by the prosecution, of highly inflammatory words used by Petitioner AFFLERBACH to the I.R.S. agents, but Norman himself, even repeated these words to the jury, several times. This was extremely prejudicial to Petitioners' case, by exciting the passions and/or prejudice of the jurors, as to race and religion, constituting grounds for reversal. 45 ALR2d 303

As to motions, Mr. Norman's Motion for Transfer within the District (DN-14) was lacking in case law, had almost no argument and was not supported by Affidavits from Petitioners as to the effect of trial in Cheyenne. No wonder it was denied.

Also, the Motion to challenge the array (28 U.S.C. 1867(f)) was a motion Mr. Norman agreed should be filed and he even suggested

a special, expert jury-selection witness for an evidentiary hearing, to research and to present evidence as to the cognizance of non-voters, since 1976, when voter studies began to be made. Petitioners paid him an extra $3,000.00 for this study to be made (P.O.A.B.-p.14). The study was never made, the motion was never filed and Mr. Norman has refused to returnthe $3,000.00. Petitioners strongly believe that the information discovered since 1976 on this subject, would have provided that they were denied a fair cross-section of the community in the array, from which both their grand and petit jurors were selected. However, due to Mr. Norman's negligence, they are precluded from even raising this issue because the motion was never filed, even though he 'joined' Mr. Moench's motion on this, Mr. Moench waited until almost a week

before trial to file it and there was not time for any effective jury selection study or evidentiary hearing to present evidence, as it was not humanly possible to assemble, inspect, record, analyze, chart, graph the Jury Commission data involving 23 counties and 324,004 people over 18 which comprise the judicial district of Wyoming, in the week prior to trial. The study would require a staff and Mr.Moench was reluctant to ask the government for such assistance (P.O.A.B.-p.16).

However a growing number of cases recognize the constitutional right to the assistance of experts and investigators as an adjunct to the effective assistance of counsel.

> "Furnishing him with a lawyer is not enough; the best lawyer in the world cannot completely defend accused person if the lawyer cannot obtain existing evidence cru-

> cial to the defense, e.g., if the defendant cannot pay the fee of an investigator to find a pivotal missing witness or a necessary document, or that of an expert accountant or a mining engineer or chemist. It might indeed be argued that for the government to defray such expenses which the indigent accused cannot meet is essential to that assistance of counsel which the Sixth Amendment guarantees...In suchcircumstances, if the government does not supply the funds, justice is denied the poor - and represents but a(n) upper bracket privilege." U.S. v. Johnson, (1956-2d Cir. - N.Y.) 238 F.2d 565, 572.

MR. AFFLERBACH's counsel, directly denied him this effective assistance and thereby also denied him equal protection of the law, in violation of AFFLERBACH's Fifth Amendment right. Also Mr.Moench frequently repeated some of AFFLERBACH's inflammatory words to the jury.

Mr. Norman also flatly refused to rep-

resent MR. AFFLERBACH,[10] forcing a split in the defense early on, since MR.AFFLERBACH was incarcerated in Cheyenne on unreasonable bail, which the court refused to reduce, due to his alleged flight from prosecution for almost six months.

Further, it has been held that, counsel must act, "in the role of an active advocate in bahalf of his client. Anders v. California, (1967) 386 U.S. 738, 744. Mr. Norman was never an 'active advocate' for Petitioners. Onthe contrary he frequently deferred to the court, against his clients best ineresets.

Also he was highly intimidated by the I.R.S., who just 'happened' to audit Mr. Norman, his secretary and his investigator,

---

fn.10 - See: MTP, April 20, 1982, p.11, ln.15-17 and also Code of Professional Responsibility - Ethical Considerations 2-27

all during the pre-trial period. These three audits acted as extreme harassment and intimiation of counsel by Petitioners' adversary, the government, through abuse of the I.R.S. powers.

The Tenth Circuit is not in agreement with other circuits in the matter of effective counsel.

The 'farce and mockery' test is no longer the norm. U.S. v. Bosch, (1978 - 1st Cir.) 584 F.2d 1113, at 1121(8).

The Tenth Circuit's 'standards' on this counsel question, differ widely from the D.C. Circuit Court as set down in U.S. v. DeCoster, (1973 - D.C. Cir.) 487 F.2d 1197, and with the Fourth Circuit as set out in Coles v. Peyton, 389 F.2d 224.

The DeCoster standards for 'effective assistance' of counsel, are set forth at pages 1203 and 1204. They include that

counsel should be guided by the ABA standards for the defense function; that counsel should confer with his clients as often as necessary; and discuss fully, potential strategies and tactical choices; that counsel should take prompt legal action to protect clients' rights; that counse should conduct appropriate investigations, both factual and legal to determine what lines of defense should be developed; that he or his agent should interview government witnesses as well as his own; that the duty; to 'investigate' requires adequate legal research.

> "If a defendant shows a substantial violation of any of these requirements he has been denied effectivce representation, unless the government ... can establish a lack of prejudice thereby. Coles v. Peyton, 389 F.2d 224 (4th Cir. - 1969)" DeCoster, supra

Much of this criteria is not discernible from the trial record alone, on which the

Tenth Circuit relied. Their Opinion states that,

> "The trial record establishes that appellants' lawyer exercised "the skill, judgment and diligence of a reasonably competent defense attorney," as required by; this circuit." (cites om.)
> Opinion-p.8

For the sake of 'brevity' this is but a 'bird's eye view' of Petitioners' twelve page argument and case law, which also quoted at length from Judge Bazelon's article, "The Defective Assistance of Counsel", 42 Univ. of Cin. L. Rev. 1 (1973), but most important, is his candor.

> "...The final reason why judges are reluctant to reverse convictions on grounds of inadequate assistance is particularly disturbing to me. It is the belief - rarely articulated, but I'm afraid, widely held - that most criminal defendants are guilty anyway. From this assumption it is a short path to the conclusion that the quality of representation is of small account.

Bazelon article supra, p.26

A false picture is painted of Petitioners. They did not insist on a battery of unsound motions and then sulk when they weren't filed. To the contrary, they wanted the motions their counsel filed to be <u>well</u> done and to have proper research on the Jury Challenge motion, to which their counsel agreed and was very enthusiastic about. It's non-filing was simple negligence.

There was almost no preparation and no investigation by Mr. Norman, of witnesses, marshalling of evidence etc. The cancelled appointments and lack of communication Petitioners <u>now</u> know, was due to hangovers, mostly.

> "Accordingly, the record is remanded for a supplemental hearing on counsel's preparation and investigation, and Appellant's present counsel is given leave to file a motion for a new trial on remand." <u>DeCoster</u>, supra at

p.1201 (III, 4-6)

Mr. Norman's pre-trial inactivity and unavailability, his careless approach to Petitioners' trial and his actions at trial, have hopelessly prejudiced their cse, denying their Sixth Amendment right to effective assistance of counsel.

Petitioner AFFLERBACH, also believes he was likewise denied effective assistance of counsel due to Mr.Moench's negligence in the Motion to Challenge the Array (28 U.S.C. 1867(f), (a), (d).) and by his repeated use of AFFLERBACH's unfortunate inflammatory remarks.

Petitioners urge this Court to remand for a supplemental hearing on this clouded, but vital issue, as per the DeCoster case.

> "...where the charge is just, the remedy is not to save counsel from embarrassment but to save his client from unjust conviction or sentence." Bazelon article,

fn.69, p.25

QUESTION V

WERE THE ESSENTIAL INGREDIENTS OF THE CRIME CHARGED ADEQUATELY PRESENTED TO THE JURY BY THE COURT'S INSTRUCTIONS?

Peitioners believe that the Circuit Court has so far departed from the accepted and usual course of judicial proceedings, by ignoring the evidence, as to call for an exercise of this Court's power of supervision, as per its Rule 17.

The Tenth Circuit, in its Opinion (A-1, p.9) admits that Petitioners are entitled to instructions on their theory of defense, which they were not given, but the Court adds, "only if there is evidence to reasonably support the theory."

MR. WATSON testified as to his ownership of a $20,000 Massey-Ferguson tractor, which was tagged and hooked up to be towed away even though it was not on the seizure

warrant. TT-VOL.II p.277; he testified as to his knowledge of the ownership of some carpet-cleaning equipment, several barrels of chemicals and soaps etc. stored on the ANNIS property and belonging to JOHN and MICHAEL COTTON who were in the rug cleaning business. TT-Vol.II, p.276; and he testified as to his knowledge of Petitioner AFFLERBACH's "gas-driven ...Lincoln arch-welder." TT-Vol.II. p.284.

The Tenth Circuit held that, "...appellants did not present any evidence that the machinery belonged to them." Is sworn testimony not evidence? If paper documentation was required, that goes to the denial of effective assistance of counsel in Question IV. Mr. Norman should have had Petitioners present their documentation in court, if sworn testimony was not enough, since a good part of the case hung on the

claim that Petitioners were protecting their own property, for which there was no seizure Order.

Defendants in criminal cases are entitled to have presented instructions relating to their theory of defense, for which there is any foundation in evidence. Strauss v. U.S., (1965-5th Cir.) 376 F.2d 416. Petitioners were entitled to an instruction on their theory of defense, even if the evidence is weak, insufficient, inconsistant or of doubtful credibility and even though the sole testimony insupport of the defense is their own. Tatum v. U.S., (1951-D.C. Cir.) 190 F.2d 612. They are entitled to an instruction on any issue fairly raised by evidence, whether or not consistent with their testimony or the defense trial theory. Womack v. U.S., (1964-D.C. Cir.) 336 F.2d 959.

Both defense counsels, Mr. Norman and

Mr. Moench, were negligent in this matter, nor did the court act sua sponte, in behalf of Petitioners. It is the duty of the court, to instuct on the basic issues necessary for the jury's guidance, without request. Dauer v. U.S., (1951-10th Cir.) 189 F.2d 343.

The court's failure to instruct the jury, even without request, on the defense's theory and beliefs, was highly prejudicial to their case, constituting substantial error. It amounted to the denial of a fundamental right of fair trial. Fischer v. U.S., (1954 - 10th Cir.) 212 F.2d 441.

QUESTION VI

DO THE SENTENCES CONSTITUTE CRUEL AND UNUSUAL PUNISHMENT?

While Petitioners are relieved that the excessive probation periods for J. COTTON, M. COTTON and AFFLERBACH have been recog-

nized by the Court and vacated, Petitioners believe that the prison sentences are still excessively harsh and particularly in the case of AFFLERBACH, who was sentenced to seven years imprisonment when he didn't do anything more than anyone else - except - to utter some foul language and racial slurs to the I.R.S. agents. Petitioners believe that he was not tried for foul language and racial slurs and should not be sentenced for them, and that to do so is the height of cruelty and is certainly unusual in America, constituting a violation of his First Amendment right to free speech. He was also sentenced to 'psychiatric evaluation'. This is how they dispose of dissidents in the Soviet Union. Is mind control and behavior 'modidication' not cruel and unusual? Is this court familiar with Alexander Solzhenitsyn's "Gulag Archipelago"?

MR. AFFLERBACH is a man of strong convictions and his views are contrary to the views of the government and especially the I.R.S.but his 'views' were not on trial. How then can he be punished for them or smeared with the label of 'mental illness' or labeled a 'behavioral problem' because his views and beliefs do not bear the feder-

MR. AFFLERBACH is a man of strong convictions and his views are contrary to the views of the government and especially the I.R.S.but his 'views' were not on trial. How then can he be punished for them or smeared with the label of 'mental illness' or labeled a 'behavioral problem' because his views and beliefs do not bear the feder-

al seal of approval'. Unpopular views are protected by the First Amendment. (P.O.A.B. - p.46, 48, 49)

In 1949, this Supreme Court reversed

the conviction of a speaker who gave an address in a public auditorium with about 800 people present and about 1,000 gathered outside to protest his remarks. Terminiello was arrested for 'disorderly conduct' and the jury was told it could convict him, if his speech "stirs the public to anger, invites dispute, brings about a condition of unrest, creates a disturbance, or arouses alarm. This was error. The Court said:

> "A conviction resting on any of these grounds may not stand." Terminiello v. Chicago, (1949) 337 U.S. 1

Again in 1963, this Court, in the Edwards case, said that it was not enough that speeches stirred people to anger, invited public dispute, or brought about a condition of unrest.

> "A conviction resting on any of these grounds may not stand." Edwards v. So. Carolina, (1963) 372 U.S. 229

And in 1966, this Court held that,

> "...people who want to propagandize protests or views have a constitutional right to do so whenever, and however and wherever they please." Adderley v. Florida, (1966) 385 U.S. 39

Surely MR. AFFLERBACH has the same right to express his views, no matter how unpopular.

The same law and arguments apply to MR. JOHN COTTON who was sentenced to two years in prison. At the sentencing the Court attributed to JOHN COTTON,

> "...some of the same type of incipient behavior...that has come to full maturity in DR. AFFLERbach. He seems to have an obsession and fixation with these Tax Laws." ST - p.34, ln.19-23

JOHN COTTON was not tried for his ideas on the tax laws and should not be sentenced for them. He did three tours in Viet Nam, won the Bronze Star and was honorably discharged. In reviewing his record as a responsible citizen in his community the Court

admitted,

> "THE COURT: Very impressive record. No question about it." ST - p.37, ln.6-7

MICHAEL COTTON was sentenced to 18 months imprisonment. Except for this one occasion, he is a quiet, respectable member of his community. He is married, with one son and one daughter (5 and 12), and has an honorable discharge from the U.S. Army.

MR. ANNIS and MR. WATSON are also quiet, peaceful, respectable members of their communities. MR. WATSON, a rancher, is married and has two daughters (13 and 15) and MR. ANNIS is a rancher and a bachelor, who lives alone.

The published statistics of the federal Courts show that a large number of felons are given probation, even when they are not first offenders. It is cruel and unusual in the extreme, to give such harsh sentences to

persons who are not embarked upon lives of crime and who are decent, stable, members of their communities and are all first offenders, except AFFLERBACH who was convicted on income tax evasion in September 1975.

While the district court insisted it was not punishing the Petitioners for their 'ideas' (ST - p.18, ln.23-25) the Court implied that if Petitioners were to 'change' their ideas on taxes, then it will "take another look" at the sentences. ST - p.32, ln.2-7.

WATSON and ANNIS were each sentenced to three years probation, of which three months was to be in a 'jail-type setting'.

Also, at the Sentencing Hearing, Mr. Pico, the U.S. Assistant attorney, asked the court to consider in its sentencing, the fact that Petitioners gave a news interview to a reporter, after the trial because,

> "They certainly did nothing to stifle or hinder the reporter conucting his interview. They conducted them willingly; ..." ST - p.53, ln.8-10

Petitioners protest the sentences as disproportionate, under the circumstances.

> "The Eight Amendment bars not only those punishments that are 'barbaric' but also those that are 'excessive' in relation to the crime committed, and a punishment is 'excessive' and unconstitutional if it (1) makes no measurable contribution to acceptable goals of punishment and hence is nothing more than the purposeless and needless imposition of pain and suffering or (2) is grossly out of proportion to the severity of the crime." Coker v. Georgia, 433 U.S. 584

Regardless of the government's dislike of Petitioners' political and economic opinions, it is cruel and unusual to punish them for them, by basing any portion of their sentences upon facts, for which they were not tried.

Even sentences 'within the statutory

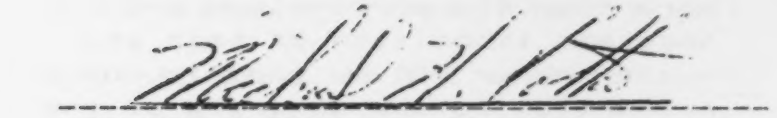
limits' can be cruel and unusual, if a maximum is given where a minimum would be proper.

CONCLUSION

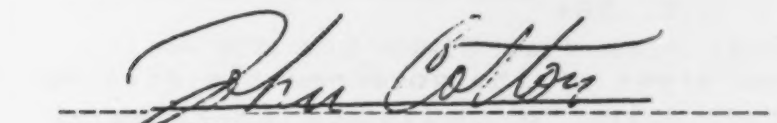
For the above stated reasons, a WRIT OF CERTIORARI should issue, to review the Judgement and Opinion of the Tenth Circuit.

Dated: 5-14-85

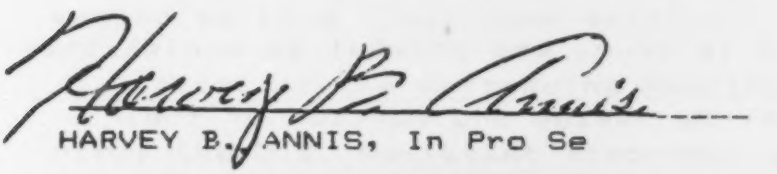
Respectfully submitted,



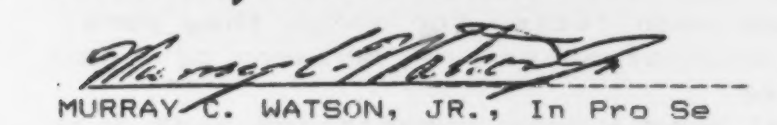
MICHAEL COTTON, In Pro Se



JOHN COTTON, In Pro Se



HARVEY B. ANNIS, In Pro Se



MURRAY C. WATSON, JR., In Pro Se

Joseph Afflerbach

JOSEPH AFFLERBACH, In Pro Se

BY: Cathy A. Wollard

CATHY A. WOLLARD, P.O.A.

MICHAEL COTTON, In Pro Se
JOHN COTTON, In Pro Se
HARVEY B. ANNIS, In Pro Se
MURRAY C. WATSON,JR., In Pro Se
JOSEPH AFFLERBACH, In Pro Se
1353 Cody
Casper, Wyoming - 82604
(307) 234-2310

A P P E N D I X

1-18-85

82-1710 - 82-1984
82-1985 - 82-1986
82-1987

United States Court of Appeals

For the Tenth Circuit

SLIP OPINION

FILED
UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

January 18, 1985

HOWARD K. PHILLIPS
Clerk

PUBLISH

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff-Appellee,	)	
	)	Nos. 82-1710,
vs.	)	82-1984,
	)	82-1985,
JOSEPH AFFLERBACH, JOHN	)	82-1986, and
COTTON, MICHAEL COTTON,	)	82-1987
HARVEY M. ANNIS, AND	)	
MURRAY WATSON,	)	
	)	
Defendants-Appellants.	)	

APPEAL FROMTHE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF WYOMING
(D.C. NOS. CR-8156, 8156-1, 8156-2,
8156-4, 8156-5

Submitted on the briefs.

Michael G. Katz, Federal Public Defender, Vicki Mandell-King, Assistant Federal Public Defender, Colorado, for Defendants-Appellants.

RICHARD A. STACY, United States Attorney, Francis Leland Pico, Assistant United States Attorney, Lisa Leschuck, Legal Intern, Cheyenne, Wyoming, for Plaintiff-Appellee.

Before McKay, DOYLE and LOGAN, Circuit Judges.

DOYLE, Circuit Judge.

After examining the briefs and the appellate record, this three-judge panel has determined unanimously that oral argument would not be of material assistance in the determination of this appeal. See Fed.R.App.P. 34(a); Tenth Circuit R. 10(e). The cause is therefore ordered submitted without oral argument.

This is an appeal by Joseph Afflerbach, John Cotton, Michael Cotton, Harvey Annis, and Murray Watson from their criminal convictions inthe United States District Court for the District of Wyoming. We affirm the judgments of conviction.

The facts are that for some time the Internal Revenue Service ("IRS") had tried to collect taxes due from appellant Harvey Annis. The IRS secured a judicial determination that Annis owed the money, United States v. Anderson, et. al, No.

81-1349, slip op. (10th Cir. Nov. 23, 1981) (per curiam); United States v. Annis, 634 F.2d 1270 (10th Cir. 1980), and sent him several deficiency notices. Annis failed to respond to the notices and this caused the district court to issue on order on July 17, 1981, allowing IRS agents to enter Annis's farm and seize machinery and equipment to satisfy the deficiency.

IRS Special Agents Benjamine Baker and Robert Freeland proceeded to inspect the Annis property to make certain of its exact location. They returned with Revenue Officers Andrew Tagliavore and John Dalrymple and Natrona County Deputy Sheriff Gerald Wushbon. Officer Tagliavore testified that the special agents were necessary because of Annis's past resistance, and that a confrontation could possibly be anticipated. The agents began

tagging the equipment specified in the order. After that, as some of the machinery was being readied to be towed away, appellant Murray Watson arrived. Watson asked Deputy Wushbon to arrest the agents for stealing the equipment, claiming that much of it belonged not to Annis but to the other appellants. Agent Baker told Watson that if he could document his ownership of the equipment, the equipment would not be taken. Watson left the Annis farm inorder to obtain the necessary documents and to notify the other appellants.

Just as the agents began to leave, the appellants drove their trucks to the entrance of the farm. There is some dispute whether the vehicles blocked the agents' exit. The appellants, armed with pistols, 12-gauge shotguns, and a Colt AR 15 semi-automatic rifle, got out of their

trucks and approached the agents. Appellants Afflerbach, John Cotton, and Michael Cotton confronted Agent Freeland and Deputy Wushbon, threatening them with violence. Simultaneously appellants Annis and Watson discussed the situation with Agent Baker. At last the agents agreed to leave the equipment on the Annis property if the appellants would put awaytheir weapons. No one was harmed, and the appellants returned to their trucks. The IRS has not attempted seizure of the equipment since that incident.

On September 4, 1981 the appellants were indicted. Count I charged them with violataion of 18 U.S.C. § 111[1] and § 2[2]

---

1. 18 U.S.C. § 111 provides:

Whoever forcibly; assaults, resists, opposes, impedes, intimidates, or interferes with any person designated

(con't. next page)

for forcibly interfering with or assaulting federal officers. Only appellant Watson was not charged in that count with the use of a deadly weapon. Count II charged all out Watson with violation of 18 U.S.C. § 924(c)[3] for the use of a firearm in the commission of a felony. Trial was held in the United States District Court for the District of Wyoming.

(con't. from previous page)
in section 1114 of this title while engaged in or on account of the performance of his official duties, shall be fined not more than $5,000 or imprisoned not more than three years or both.

Whoever, in the commission of any such acts uses a deadly or dangerous weapon, shall be fined not more than $10,000 or imprisoned not more than ten years, or both.

2. 18 U.S.C. § 2 provides:

(a) Whoever commits an offense against the United States or aids, abets,
(con't on next page)

(con't. from previous page)
counsels, commands, induces or procures its commission, is punishable as a principal.

(b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

3. 18 U.S.C. § 924(c) provides:

(c) Whoever --

(1) uses a firearm to commit any felony for which he may be prosecuted in a court of the United States, or

(2) carries a firearm unlawfully during the commission of any felony for which he may be prosecuted in a court of the United States,

shall, in addition to the punishment provided for the commission of such felony, be sentenced to a term of imprisonment for not less than one year nor more than ten years. In the case of his second or subsequent conviction under this subsection, such person shall be sentenced to a term of imprisonment for not less than two nor more than twenty-five years and, notwithstanding any other provision of law, the court shall not suspend the sentence in the case of a second or subsequent conviction of such person or

(con't. next page)

(con't. from previous page)

> give him a probationary sentence, nor shall the term of imprisonment imposed under this subsection run concurrently with any termof imprisonment imposed for the commission of such felony.

Afflerbach, John cotton,and Michael Cotton were convicted on both counts. Annis and Watson were found guilty of a lesser included offense under Count I, that of forcibly interfering with a federal officer without the use of a deadly weapon, and were found not guilty on Count II. Afflerbach was sentenced to seven years' imprisonment on Count I, followed by five years' probation on Count II. John Cotton was sentenced to two years' imprisonment on Count I, followed by five years' probation on Count II. Michael Cotton received eighteen months' imprisonment on Count I and four years' probation on Count II. Annis and Watson were sentenced to three years'

probation on Count I, three months of which were to be served in jail. All five appellants appeal on various grounds.

Appellants first claim was that the district court abused its discretion by failing to grant their motion for transfer within the district. Appellants had moved for the trial to be held in Casper, where they, along with their attorney and some of their witnesses, lived. The district court denied the motion, deciding that for security reasons, the trial should be held in Cheyenne, where the federal marshal's personnel were more readily available. Rule 18, F.R.Cr.P. provides that "[t]he court shall fix the place of trial within the district with due regard to the convenience of the defendant and the witnesses and the prompt administration of justice." Appellants argue that the district court

failed to consider their convenience in setting the place of trial.

This court has held that the mere fact that a defendant's home is nearer one trial site than another is insufficient to merit transfer. United States v. Lawson, 670 F.2d 923, 926 (10th Cir. 1982). A defendant must allege "specific prejudice," resulting from the court's refusal to transfer. Id. Appellants here have failed to establish any such prejudice. Futhermore, Rule 18 allows a court to consider "the prompt administration of justice" in fixing the place of trial and matters of security clearly fall within that consideration. Hence the district court did not abuse its discretion in denying appellants' motion to transfer the trial to Casper.

Second, the appellants argue that the district court erred in denying their

motion to stay the proceedings because non-registered voters were not included in the jury pool. The District of Wyoming chooses its prospective jurors solely from voter registration lists, a process which appellants claim precludes the selection of a fair cross-section of jurors.

The statute, 28 U.S.C. § 1861, allows litigants "the right to grand and petit juries selected at random from a fair cross section of the community in the district or division wherein the court convenes." Section 1863(b)(2) provides that voter registration lists are to be the primary source of prospective jurors. "The supplementation of voter lists is the exception, not the rule, and absent a showing of deficient representation the use of an approved jury selection process is lawful." United States v. Bennett,

539 F.2 45, 55 (10th Cir.), cert. denied, 429 U.S. 925 (1976). Appellants can prevail only if they show that the district's reliance on registration lists systematically excluded a distinct, cognizable class of persons from jury service. United States v. Test, 550 F.2d 577, 586 (10th Cir. 1976); United States v. Grismore, 546 F.2d 844, 848 (10th Cir. 1976); United States v. Bennett, supra at 55. Persons who choose not to register to vote do not comprise such a cognizable group. Reed v. Wainwright, 587 F.2d 260, 264 (5th Cir. 1979); United States v. Lewis, 472 F.2d 252, 256 (3d Cir. 1973). The district court thus properly denied appellant's motion to stay proceedings in that the appellants failed to establish that the jury selection process systematically excluded a cognizable class.

Third, appellants advance the contention that the IRS agents' attempted seizure of equipment was itself illegal and that therefore the appellants had the right to resist. The IRS has the right to levy the property of a taxpayer who has failed to pay any federal tax. 26 U.S.C. § 6331 (a). The district court order, allowing seizure of Annis's equipment, was properly entered, and the seizure was legal.[4] The appellants had no right to resist the IRS agents. This circuit has held that a third person has no right to intervene in an arrest when he knows or has reason to know the officer is authorized to make the arrest. United States v. Vigil, 431 F.2d 1037, 1042 (10th Cir. 1970). By analogy,

---

[4] Even if the seizure were illegal, appellants' recourse lies in a civil proceeding, not in resisting the seizure themselves.

the appellants here had no right to resist the seizure of equipment when the agents clearly identified themselves and showed the appellants a copy of the district court order.

Fourth, appellants advance the argument that they were denied their Sixth Amendment right to effective assistance of counsel. They maintain that their attorney was not prepared, failed to file all motions requested by the appellants, and filed other motions that were insufficient. The trial record establishes that appellants' lawyer exercised "the skill, judgment and diligence of a reasonably competent defense attorney," as required by this circuit. United States v. Golub, 694 F.2d 207, 213 (10th Cir. 11982); United States v. Crouthers, 669 F.2d 635, 643 (10th Cir. 1982); Dyer v. Crisp, 613 F.2d 275, 278 (10th Cir.), cert. denied,

445 U.S. 945 (1980). The attorney's decision not to file all motions requested by his clients was not ineffective assistance of counsel. Effective assistance "does not demand that every possible motion be filed, but only those having a solid foundation." United States v. Crouthers, supra at 643, quoting United States v. Hines, 470 F.2d 225, 232 (3d Cir. 1972), cert. denied, 410 U.S. 968 (1973).

Appellants' fifth claim is that the district court erred in instructing the jury that third persons (for example, Watson, Afflerbach, John Cotton, and Michael Cotton) do not have the right to intervene and assist the person (Annis) whose property the IRS agents had attempted to seize. Appellants assert that the instruction was misleading because they acted to prevent the taking of their own property, not the

property of another. It is true that appellants are entitled to instructions on their theory of defense only if there is evidence to reasonably support the theory. United States v. Hoopes, 545 F.2d 721, 721 (10th Cir. 1976), cert. denied, 431 U.S. 954 (1977). As we stated earlier, the district court order allowed the IRS to confiscate Annis's property, not that of the other appellants. The order was presumptively legal, and the appellants did not present any evidence that the machinery belonged to them. In any event, appellants' presence on Annis's property prevented the IRS agents from confiscating any of Annis's equipment.

Sixth, appellants make the argument that the IRS lacked "jurisdiction" over Annis' equipment because Annis was not given advance notice of the levy. However, notice of that levy comported with the requirements

of both G.M. Leasing Corp. v. United States, 429 U.S. 338, 350 (1977) ("Levy upon tangible property normally is effected by service of forms of levy or notice of levy and physical seizure of the property; where that is not possible, the property is posted or tagged") and the version of 28 U.S.C. § 6331 then in effect (ten-day notice not required in these circumstances).

Last, appellants argue that they were charged under the wrong statute and that the sentences they received constitute cruel and unusual punishment. Appellants' assertion of cruel and unusual punishment must fail because the sentences they received were all within the statutory limits. United States v. MacClain, 501 F.2d 1006, 1013 (10th Cir. 1974). However, Busic v. United States, 446 U.S. 398 (1980) compels us to vacate the probationary sentences received by

Afflerbach, John Cotton, and Michael Cotton for violation of 18 U.S. C. § 924(c). Because these appellants were convicted under 18 U.S.C. § 111, which contains its own enhancement of sentence provision, thei sentences cannot be further enhanced by § 924(c). Thus, although we affirm all the appellants' convictions and sentences under 111, we must vacate the sentences received by Afflerbach, John Cotton, and Michael Cotton under § 924(c).

Nos. 82-1710, 82-1984, 82-1985, 82-1986, and 82-1987 - UNITED STATES OF AMERICA v. JOSEPH AFFLERBACH, JOHN COTTON, MICHAEL COTTON, HARVEY M. ANNIS, and MURRAY WATSON

McKAY, Circuit Judge, dissenting:

I respectfully dissent.

On September 4, 1981, defenants were indicted for impeding Internal Revenue Service agents in carrying out a lawful levy on the property of defendant Harvey Annis. Count I of the indictment charges violation of 18 U.S.C. § 111[1] and 18 U.S.C. § 2, and

---

[1] Whoever forcibly assaults, resists, opposes, impedes, intimidates, or interferes with any person designated in 1114 (including agents of the I.R.S.) of this title while engaged in or on account of the performance of his official duties, shall be fined not more than $5,000 or imprisoned not more than three years, or both.

(con't. next page)

Count II of the indictment charges a violation of 18 U.S.C. § 924(c).[2]

Defendant Afflerbach was convicted and sentenced to seven years on Count I of the

---

(con't. from previous page)

> Whoever, in the commission of any such acts uses a deadly or dangerous weapon, shall be fined not more than $10,000 or imprisoned not more than ten years, or both.

18 U.S.C. § 111.

[2]

> Whoever--
>
> (1) uses a firearm to commit any felony for which he may be prosecute in a court of the United States, or
>
> (2)carries a firearm unlawfully during the commission of any felony for which he may be prosecuted in a court of the United States,
>
> shall in addition to the punishment provided for the commission of such felony, be sentenced to a term of imprisonment for not less than one year nor more than ten years.

18 U.S.C. § 924(c).

indictment and was sentenced to a period of five years probation under Count II of the indictment. Defendant John Cotton was sentenced to two years under Count I of the indictment and to probation for a period of five years under Count II of the indictment. Defendant Michael Cotton was sentenced to incarceration for 18 months under Count I of the indictment and to four years probation under Count II of the indictment. Defendants Harvey Annis and Murray Watson were both convicted only under Count I of the indictment and were sentenced to three years custody.

I. Defendants were improperly sentenced under a general criminal statute when their conduct violated a specific statute.

The sentencing in the present case violates the time-honored rule of statutory construction that "a more specific statute

will be given precedence over a more general one, regardless of their temporal sequence." Busic v. United States, 446 U.S. 398, 406 (1980). This rule has long been followed to prevent a defendant from being convicted under a general statute when a specific statute more particularly describing his criminal conduct has been enacted. Enzor v. United States, 262 F.2d 172 (5th Cir. 1958) (conspiracy to sell narcotics must be punished under statute respecting conspiracy to violate narcotics laws, 26 U.S.C. § 7237(b), rather than under general conspiracy statute); United States v. Bates, 429 F.2d 557 (9th Cir. 1970) (conspiracy to sell narcotics must be punished under 26 U.S.C. § 7237 rather than under 18 U.S.C. § 371, the general conspiracy statute); Robinson v. United States, 142 F.2d 431 (8th Cir. 1944) (property stolen from the post

office must be punished under 18 U.S.C. § 313 rather than 18 U.S.C. § 99, which prohibits stealing personal property belonging to the United States).

The continued reliability of this doctrine of statutory construction has been called into question by a recent United States Supreme Court opinion. In United States v. Batchelder, 442 U.S. 114 (1979), the Court held that the U. S. Attorney had the discretion to choose which of two statutes prohibiting receipt of firearms by a convicted felon he would proceed under, even though the statute he proceeded under carried a longer maximum term of imprisonment for its violation. Since Batchelder some courts have held that there is no federal rule limiting the government's discretion to proceed under a general statute in opposition to the provisions of a

specific statute. See United States v. Carpenter, 611 F.2d 113 (5th Cir. 1980); United States v. Simon, 510 F. Supp. 232, 237 (E.D. Pa. 1981).

I find this reliance on Batchelder improper and decline to follow the reasoning of these cases. Batchelder did not involve a general and a specific statute but dealt with two statutes which proscribed, in almost identical terms, the conduct for which the defendant was convicted. Thus the holding in Batchelder does not undermine the longstanding rule that a specific statute governs over a general statute, particularly in light of the Busic Court's subsequent reliance upon this doctrine in holding the general enhancement statute section 924(c) inapplicable in fact of the specific enhancement provision found in section 111.

Moreover, the rule that a specific

statute should govern over a general statute should not be lightly disregarded. As the Court explained in Simpson v. United States, 435 U.S. 6 (1978), the rule that a specific statute should prevail is a corollary to the rule of lenity ("ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity," United States v. Bass, 404 U.S. 336, 347 (1970)), and has "special cogency where a court is called upon to determine the extent of the punishment to which a criminal defendant is subject for his transgressions. ...[The rule is] an outgrowth of our reluctance to increase or multiply punishments absent a clear and definite legislative directive." Simpson, 435 U.S. at 15.

I therefore conclude that, despite Batchelder, the rule remains that where a defendant is convicted of a specific crime

for which Congress has intentionally proscribed a more lenient punishment, the prosecution and the courts are not at liberty to defy that specific congressional mandate.

Title 18 U.S.C. § 111 is a general statute that prohibits interference with federal officers in the conduct of their duties, whereas 16 U.S.C. § 7212(a) prohibits the forcible interference with the duties of IRS agents.[3] The indictment and

---

3 (a) Corrupt or forcible interference.--Whoever corruptly or by force or threats of force (including any threatening letter or communication) endeavors to intimidate or impede any officer or employee of the United States acting in an official capacity under this title, or in any other way corruptly or by force or threats of force (including any threatening letter or communication) obstructs or impedes, or endeavors to obstruct or impede, the due

(con't. next page)

evidence at trial proved a violation of 26 U.S.C. § 7212(a). From the foregoing discussion, it is clear that the defendants were convicted under the wrong statute and were therefore improperly sentenced.

II. Defendants' sentences violated Busic v. United States

Had we not determined that defendants were improperly sentenced under

---

(con't. from previous page)

> administration of this title, shall, upon conviction thereof, be fined not more than $5,000, or imprisoned not more than 3 years, or both, except that if the offense is committed only by threats of force, the person convicted thereof shall be fined not more than $3,000, or imprisoned not more than 1 year, or both. The term "threats of force," as used in this subsection, means threats of bodily harm to the officer or employee of the United States or to a member of his family.

26 U.S.C. § 7212(a).

18 U.S.C. § 111, the enhancement under 18 U.S.C. § 924(c) would have been improper. In Busic v. United States, 446 U.S. 398 (1980), the Supreme Court determined that persons convicted under 18 U.S.C. § 111 could not have their sentences enhanced by conviction under 18 U.S.C. § 924(c). Each of the defendants received a term of imprisonment for his conviction under 18 U.S.C. § 111 and three of the defendants have received an enhanced sentence, albeit probation, for their convictions under 18 U.S.C. § 924(c). Thus, the three sentences directly conflict with Busic.

While normally a Busic problem requires reversal of the section 924(c) conviction, this case does not require this remedy. 26 U.S.C. § 7212(a) uner which defendants must be sentenced does not contain an enhancement

provision for the use of firearms. Thus, sentencing under this provision can be accompanied by an enhanced sentence under 18 U.S.C. § 924(c) without violating Busic. In my view, since section 924(c) creates a separate crime, rather than merely providing for enhancement of penalty on the underlying felony, United States v. Sudduth, 457 F.2d 1198 (10th Cir. 1972), the defendants' sentences under section 924 (c) are valid.

III. Remedy

The remedy for sentencing under the wrong statute is to remand the case to the district court for resentencing under the proper statute, 26 U.S.C. § 7212. See Enzor v. United States, 262 F.2d 172, 175 (5th Cir. 1959); United States, v. Bates, 429 F.2d 557, 559-60 (9th Cir. 1970).

The convictions should be affirmed, and the case should be remanded for resentencing on Count I under 26 U.S.C. § 7212(a).

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT
Office of the Clerk
C404 United States Courthouse
Denver, Colorado 80294

HOWARD K. PHILLIPS
Clerk

TELEPHONE
(303)844-3157
(FTS)564-3157

February 12, 1985

TO: ALL RECIPIENTS OF THE CAPTIONED OPINION

RE: Nos. 82-1710, 82-1984, 82-195, 82-1986 and 82-1987; U.S.A. v. Afflerbach, et al.
Opinion filed on January 18, 1985, by Judge William E. Doyle.

Please add the attached dissent by Judge Monroe G. McKay to the opinion of this Court in the captioned cause filed on January 18, 1985. A prior dissent by Judge McKay was withdrawn by the Court on February 11, 1985. Please destroy the prior dissent and replace it with the attached dissent.

Very truly yours,

HOWARD K. PHILLIPS, Clerk

HKP:kmh
attachment

McKAY, Circuit Judge, dissenting:

I respectfully dissent.

On September 4, 1981, defendants were indicted for impeding Internal Revenue Service agents in carrying out a lowful levy on the property of defendant Harvey Annis. Count I of the indictment charges violation of 18 U.S.C. § 111[1] and 18 U.S.C. § 2, and

---

1 Whoever forcibly assaults, resists, opposes, impedes, intimidates, or interferes with any person designated in § 1114 [including agents of the I.R.S.] of this title while engaged in or on account of the

(con't. next page)

Count II of the indictment charges a violation of 18 U.S.C. § 924(c).[2]

Defendant Afflerbach was convicted and sentenced to seven years on Count I of the indictment and was sentenced to a period of five years probation under Count II of the indictment. Defendant John Cotton was

---

(con't. from previous page)

> performance of his official duties, shall be fined not more than $5,000 or imprisoned not more than three years, or both.
>
> Whoever, in the commission of any such acts uses a deadly or dangerous weapon, shall be fined not more than $10,000 or imprisoned not more than ten years, or both.

18 U.S.C. § 111.

[2] Whoever--

> (1) uses a firearm to commit any felony for which he may be prosecuted in a court of the United States, or

(con't. next page)

sentenced to two years under Count I of the indictment and to probation for a period of five years under Count II of the indictment. Defendant Michael Cotton was sentenced to incarceration for 18 months under Count I of the indictment and to four years probation under Count II of the indictment. Defendants Harvey Annis and Murray Watson were both convicted only under Count I of

---

(con't. from previous page)

> (2) carries a firearm unlawfully during the commission of any felony for which he may be prosecuted in a court of the United States,
>
> shall in addition to the punishment provided for the commission of such felony, be sentenced to a term of imprisonment for not less than one year nor more than ten years.

18 U.S.C. § 924(c).

the indictment and were sentenced to three years custody.

I. Defendants were improperly sentenced under a general criminal statute when their conduct violation a specific statute.

The sentencing in the present case violates the time-honored rule of statutory construction that "a more specific statute will be given precedence over a more general one, regardless of their temporal sequence." Busic, v. United States, 446 U.S. 398, 406 (1980). This rule has long been followed to prevent a defenant from being convicted under a general statute when a specific statute more particularly describing his criminal conduct has been enacted. Enzor v. United States, 262 F.2d 172 (5th Cir. 1958) (conspiracy to sell narcotics must be

punished under statute respecting conspiracy to violate narcotics laws, 26 U.S.C. § 7237(b), rather than under general conspiracy statute); United States v. Bates, 429 F.2d 557 (9th Cir. 1970) (conspiracy to sell narcotics must be punished under 26 U.S.C. § 7237 rather than under 18 U.S.C. § 371, the general conspiracy statute); Robinson v. United States, 142 F.2d 431 (8th Cir. 1944) (property stolen from the post office must be punished under 18 U.S.C. § 313 rather than 18 U.S.C. § 99, which prohibits stealing personal property belonging to the United States).

The continued reliability of this doctrine of statutory construction has been called into question by a recent United States Supreme Court opinion. In United

States v. Batchelder, 442 U.S. 114 (1979), the Court held that the U. S. Attorney had the discretion to choose which of two statutes prohibiting receipt of firearms by a convicted felon he would proceed under, even though the statute he proceeded under carried a longer maximum term of imprisonment for its violation. Since Batcheler some courts have held that there is no federal rule limiting the government's discretion to proceed under a general statute in opposition to the provisions of a specific statute. See United States v. Carpenter, 611 F.2d 113 (5th Cir. 1980);p United States v. Simon, 510 F. Supp. 232, 237 (E.D. Pa. 1981).

I find this reliance on Batchelder improper and decline to follow the

reasoning of these cases. Batchelder did not involve a general an a specific statute but dealt with two statutes which proscribe, in almost identical terms, the conduct for which the defendant was convicted. Thus the holding in Batchelder does not undermine the longstanding rule that a specific statute governs over a general statute, particularly in light of the Busic Court's subsequent reliance upon this doctrine in holding the general enhancement statute section 924(c) inapplicable in face of the specific enhancement provision found in section 111.

Moreover, the rule that a specific statute should govern over a general statute should not be lightly disregarded. As the Court explained in Simpson v. United States, 435 U.S. 6 (1978), the rule that a specific

statute should prevail is a corollary to the rule of lenity ("ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity," United States v. Bass, 404 U.S. 3;36, 347 (1971)), and has "Special cogency where a court is called upon to determine the extent of the punishment to which a criminal defendant is subject for his transgressions. ...[The rule is] an outgrowth of our reluctance to increase or multiply punishments absent a clear and definite legislative directive." Simpson, 435 U.S. at 15.

I therefore conclude that, despite Batchelder, the rule remains that where a defendant is convicted of a specific crime for which Congress has intentionally proscribe a more lenient punishment, the prosecution and the courts are not at

liberty to defy that specific congressional mandate.

Title 18 U.S.C. § 111 is a general statute that prohibits interference with federal officers in the conduct of their duties, whereas 16 U.S.C. § 7212(a) prohibits the forcible interference with the duties of IRS agents.[3] The indictment

---

3 (a) Corrupt or forcible interference.--Whoever corruptly or by force or threats of force (including any threatening letter or communication) endeavors to intimidate or impede any officer or employee of the United States acting in an official capacity under this title, or in any other way corruptly or by force or threats of force (including any threatening letter or communication) obstructs or impedes, or endeavors to obstruct or impede, the due administration of this title, shall, upon conviction thereof, be fined not more than $5,000, or imprisoned not more than 3 years, or both, except that if the offense is committed only by threats of force, the person convicted

(con't. next page)

and evidence at trial proved a violation of 26 U.S.C. § 7212(a). From the foregoing discussion, it is clear that the defendants were convicted under the wrong statute and were therefore improperly sentenced.

II. Defendants' sentences violated Busic v. United States

While normally (as the majority has noted) Busic v. United States, 446 U.S. 398 (1980), would require reversal of the section 924(c) sentence, properly analyzed this case does not require this remedy.

(con't. from previous page)

> thereof shall be fined not more than $3,000, or imprisoned not more than 1 year, or both. The term "threats of force," as used in this subsection, means threats of bodily harm to the officer or employee of the United States or to a member of his family.

26 U.S.C. § 7212(a).

Title 26 U.S.C. § 7212(a) under which defendants should have been sentenced does not contain an enhancement provision for the use of firearms. Thus, sentencing under this provision can be accompanied by an enhanced sentence under 18 U.S.C. § 924(c) without violating Busic.

III. Remedy

The remedy for sentencing under the wrong statute is to remand the case to the district court for resentencing under the proper statute, 26 U.S.C. § 7212. See Enzor v. United States, 262 F.2d 172, 175 (5th Cir. 1959); United States v. Bates, 429 F.2d 557, 559-60 (9th Cir. 1970).

I concur in the court's opinion as it relates to the first six issues addressed therein. I would affirm but remand the case

for resentencing on Count I under 26 U.S.C. § 7212 (a).

Michael H. Cotton
1353 Cody
Casper, Wyoming
234-2310

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

C404 UNITED STATES COURTHOUSE

DENVER, COLORADO 80294

UNITED STATES OF AMERICA	)	
	)	
Plaintiff,	)	Case No. 82-1984,
	)	1985, 1986,
-vs-	)	1987
	)	
John Cotton et al	)	

NOTICE TO THE COURT OF DISMISSAL OF COUNSEL

Appellants John Cotton, Michael Cotton, Harvey Annis, Murray Watson, and Joseph Afflerbach hereby notify the Court that each and everyone is totally dissatisfied with Court appointed counsel Vicki Mandell-King as set forth in attached affidavits.

Appellants find Mrs. King's opening brief to be inadequate and thereby damaging to appellants case.

There is friction, dissatisfaction, animosity and no meeting of the minds on the appellants grounds for appeal. They therefore regretfully disavow any association with Mrs. King, for said association has been unproductive (see letter Exhibit A).

Appellants herein are therefore dismissing Mrs. King as counsel on appeal.

Appellants thank the Court for its attempt to supply counsel to aid them in their appeal and apologize to the Court for any delay this may incur. Appellants have decided, collectively, that they prefer to write and file their own briefs in this case.

Appellants do not believe that a lawyer can

be forced* upon them against their will at any state of this case.

*Faretta v. Calif., (1975) 422 U.S. 806, 45 L 1d 2d 562, 95 S Ct 2525

DATED: 4/16/83

Respectfully submitted,

John Cotton
Michael Cotton
Harvey Annis
Murray Watson
Joseph Afflerbach

April 16, 1983

Michael H. Cotton
1353 Cody
Casper, Wyoming
307-234-2310

Vicki Mandell-King
Assistant Federal Public Defender
Federal Bldg, 1961 Stout Street
Denver, Colorado 80294

Dear Vicki,

We the undersigned in U.S. vs Cotton et al, presently on appeal before the Tenth Circuit, have decided that the grounds for said appeal either are not being included in your appellate brief or are inadequately set forth therein. It appears you have neither the time or the budget to devote to complete appeals briefs.

Also, unfortunately, there is no meeting of the minds between you and us

on this appeal, and we feel that your draft of the opening briefs is not only inadequate, but also damaging to our cases.

We believe there is now too much animosity and contention for an effective appeal. We have lost our confidence in you as our legal counsel. Therefore, regretfully, we believe it is best to dismiss you as our counsel in this matter and to proceed with the appeal briefs Pro Se.

Dated: April 16, 1983

Very Truly Yours,

Michael Cotton
John Cotton
Harvey Annis
Murray Watson
Joseph Afflerbach

Exhibit A

Michael H. Cotton
1353 Cody
Casper, Wyoming
307-234-2310

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT
C404 UNITED STATES COURTHOUSE
DENVER, COLORADO 80294

UNITED STATES OF AMERICA	)	
Plaintiff,	)	Case No. 82-1984,
	)	1985, 1986, 1987
-vs-	)	
	)	
Michael Cotton et al	)	

AFFIDAVIT IN SUPPORT OF NOTICE
TO THE COURT

STATE OF WYOMING)
) ss
COUNTY OF NATRONA)

I, Michael H. Cotton, having been duly sworn, depose and state under penalty of perjury:

1. I believe that it is impossible to put an appeal brief together with Vicki Mandell-King in Denver, Colorado by

telephone, especially when Mrs. King is very un-familiar with the details of this case;

2. Mrs. Mandell-King has informed me a number of times that she does not have the funds to come to Casper to meet with the appellants in this case;

3. I further state that Mrs. King has refused to bring up issues on appeal that I believe are crucial to my appeal;

4. Mrs. Mandell-King sent appellant an incomplete and very inadequate brief two days before deadline for filing, thus prohibiting appellant from changing or making a contribution to the opening brief;

5. Appellant further states that prior to accepting Mrs. King as council, I informed Mrs. King that I insisted on taking an active part in the writing of this appeal and appellant refuses to waive this right to

partake in his appeal;

6. Appellant at this time believes that there is a conflict of interest with Mrs. Mandell-King working for the U.S. Government an this case involving the U.S. Government as Plaintiff; which is too great to be overlooked, considering the nature of this case;

7. When I approved Mrs. King as council, it was my hope, that said conflict, which is inherent in the Public Defenders Office would not interfere, but it has - her opening brief appears to me to be pro government;

8. I further state that Mrs. King was going to send in a brief without, and knowingly not having complete record from the Lower Court which had crucial information pertaining to appellants appeal;

9. In consideration of the foregoing facts

I am dismissing Vicki Mandell-King as my council.

Signed: MICHAEL H. COTTON

Dated: April 16, 1983

Subscribed and sworn to before me this 18th day of April, 1983.

MARGUERITTE WALTERS
Notary Public

MARGUERITTE WALTERS
NOTARY PUBLIC
NATRONA COUNTY, WYOMING
My commission expires Aug. 17, 1983

Michael H. Cotton
1353 Cody
Casper, Wyoming
307-234-2310

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT
C404 UNITED STATES COURTHOUSE
DENVER, COLORADO 80294

UNITED STATES OF AMERICA	)	
Plaintiff,	)	Case No. 82-1984,
	)	1985, 1986, 1987
-vs-	)	
	)	
John Cotton et al	)	

AFFIDAVIT IN SUPPORT OF NOTICE
TO THE COURT

STATE OF WYOMING)
) ss
COUNTY OF NATRONA)

I, John Cotton, having been duly sworn, depose and state under penalty of perjury:

1. After a number of phone conversations with our counsel appointed by this court and having read part of her suggested brief in regard to our appeal, I have determined that

she is not representing my best interests on this appeal;

2. Mrs. King has refused to come to Casper and work on our brief with us;

3. Mrs. King has failed to get pertinent documents in our case from the lower court;

4. I believce that Mrs. King is prejudiced against all the appellants;

5. Mrs. King ruled out using issues which were recommended by our trial counsel for appeal;

6. When I approved Mrs. King as counsel, it was my hope, that said conflict, which is inherent in the Public Defenders Office would not interfere, but it has - her opening brief appears to me to be pro government;

7. I, therefore, dismiss Mrs. King as my counsel in this matter;

further affiant saith not.

DATED: April 16, 1983

Signed: JOHN COTTON

Subscribed and sworn to before me this 18th day of April, 1983.

MARGUERITTE WALTERS
Notary Public

MARGUERITTE WALTERS
NOTARY PUBLIC
NATRONA COUNTY, WYOMING
My commission expires Aug. 17, 1983

Michael H. Cotton
1353 Cody
Casper, Wyoming
307-234-2310

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT
C404 UNITED STATES COURTHOUSE
DENVER, COLORADO 80294

UNITED STATES OF AMERICA	)	
Plaintiff,	)	Case No. 82-1984,
	)	1985, 1986, 1987
-vs-	)	
	)	
John Cotton et al	)	

AFFIDAVIT IN SUPPORT OF NOTICE
TO THE COURT

STATE OF WYOMING)
) ss
COUNTY OF NATRONA)

I, Joseph Afflerbach, having been duly sworn, depose and state under penalty of perjury:

1. I believe that Mrs. King has not adequately represented my; defense on this appeal;

2. None of the facts necessary in this case have properly been presented in Mrs. King's opening brief;

3. There is no meeting of the minds of Mrs. King and myself on the facts of this appeal;

4. The truth in this case has to be brought out and since Mrs. King cannot seem to understand the errors that have been committed. I am dismissing Mrs. King at this time.

Signed: JOSEPH AFFLERBACH

DATED: April 16, 1983

Subscribed and sworn to before me this 18th day of April, 1983.

MARGUERITTE WALTERS
Notary Public

MARGUERITTE WALTERS
NOTARY PUBLIC
NATRONA COUNTY, WYOMING
My commission expires Aug. 17, 1983

Michael H. Cotton
1353 Cody
Casper, Wyoming
307-234-2310

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT
C404 UNITED STATES COURTHOUSE
DENVER, COLORADO 80294

UNITED STATES OF AMERICA	)	
Plaintiff,	)	Case No. 82-1984,
	)	1985, 1986, 1987
-vs-	)	
	)	
John Cotton et al	)	

AFFIDAVIT IN SUPPORT OF NOTICE
TO THE COURT

STATE OF WYOMING)
) ss
COUNTY OF NATRONA)

I, Harvey Annis, having been duly sworn, depose and state under penalty of perjury:

1. I have had much difficulty in contacting our counsel, Vicki Mandell-King, to discuss the issues to be appealed;

2. Mrs. King sent a rough draft of what she intended to file for our appeal, that which draft I believe was inadequate and did not embody some of the most important issues on appeal;

3. Mrs. King's appeal draft was received two days before the filing due date of the appeal and I was unable to contact Mrs. King to discuss the context thereof;

4. After contacting Mrs. King on the total unacceptability of her draft, and after much heated discussion, she did request and receive an extension of time from the court to get the miscellaneous file and compile the necessary elements on the appeal issues;

5. The last phone contact with Mrs. King, she flatly stated that she would not come to Casper and meet with us to complete our appeal;

6. I cannot be fairly represented by

counsel that refused or is unable to meet and formulate information so very important to my appeal;

7. When I approved Mrs. King as council, it was my hope, that said conflict, which is inherent in the Public Defenders Office would not interfere, but it has - her opening brief appears to me to be pro government;

8. I am hereby dismissing and disassociating Mrs. V. M. King as my counsel in the above captioned case.

Signed: HARVEY B. ANNIS

DATED: April 16, 1983

Subscribed and sworn to before me this 18th day of April, 1983.

MARGUERITTE WALTERS
Notary Public

MARGUERITTE WALTERS
NOTARY PUBLIC
NATRONA COUNTY, WYOMING
My commission expires Aug 17, 1983

Michael H. Cotton
1353 Cody
Casper, Wyoming
307-234-2310

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT
C404 UNITED STATES COURTHOUSE
DENVER, COLORADO 80294

UNITED STATES OF AMERICA)
Plaintiff,) Case No. 82-1984,
) 1985, 1986, 1987
-vs-)
)
John Cotton et al)

AFFIDAVIT IN SUPPORT OF NOTICE TO THE COURT

STATE OF WYOMING)
) ss
COUNTY OF NATRONA)

I, Murray Watson, having been duly sworn, depose and state under penalty of perjury:

1. I have called Mrs. King's office in Denver to discuss our appeal on several occasions and Mrs. King was not in the

office or busy at the time, and to date has never returned a call to me at my phone number;

2. On one occasion I talked to Mrs. King by phone and asked her if she would come to Casper and set down with us to go over our brief which she was writing, for I felt she was not bringing up the issues important to our appeal, and she stated, "No, I will not come to Casper, Wyoming, because my office does not have money in the budget for me to make the trip." I told her, we (the five appellants) were financially unable to make the trip to Denver and her answer was "Well."

3. Mrs. King had prepared a brief which was sent to Mike Cotton's home for us all to read over, this brief arrived at Mike's in Casper two days before it was to be filed with the Tenth Circuit Court, at this time I

found that brief to be incomplete and totally inadequate and asked Mrs. King to apply for an extension of time with the court which brings us to where we now are;

4. When I approved Mrs. King as counsel, it was my hope, that said conflict, which is inherent in the Public Defenders Office would not interfere, but it has - her opening brief appears to me to be pro government;

5. Considering the foregoing facts, I find Mrs. King to be inadequate to defend myself and therefore dismiss Mrs. King as my counsel.

DATED:

Signed: MURRAY C. WATSON, JR.

Subscribed and sworn to before me this 18th day of April, 1983

MARGUERITTE WALTERS
Notary Public

MARGUERITTE WALTERS
NOTARY PUBLIC
NATRONA COUNTY, WYOMING
My commission expires Aug. 17, 1983

United States Court of Appeals
TENTH CIRCUIT
Office of the Clerk
C404 United States Courthouse
Denver, Colorado 80294

MAY TERM - MAY 19, 1983

Before Honorable Monroe G. McKay and Honorable Stephanie K. Seymour, Circuit Judges.

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff-Appellee,	)	
	)	
vs.	)	
	)	
JOSEPH AFFLERBACH,	)	No. 82-1710
JOHN COTTON,	)	No. 82-1984
MICHAEL COTTON,	)	No. 82-1985
HARVEY M. ANNIS,	)	No. 82-1986
MURRAY WATSON,	)	No. 82-1987
	)	
Defendants-Appellants.	)	

This matter comes on for consideration of:

A. Appellants' motion to dismiss their appointed counsel, the Federal Public Defender.

B. Motion to represent themselves in

these appeals, pro se.

C. Request for a transcript of motions proceedings commencing April 2, 1982, before Judge Clarence Brimmer.

D. Motion for copy of Plaintiff's Exhibits 1, 3, and 4.

Upon consideration whereof, it is ordered:

1. Appellantes' motion to dismiss appointed counsel is granted.

2. Appellants' motion to represent themselves, pro se, is granted.

3. A copy of the transcript shall be loaned to appellants by the Clerk, to be returned to the Court, at the latest, when the briefs are filed.

4. The Clerk shall provide certified copies of the exhibits when the appellants

have made satisfactory arrangements with the Clerk to pay the statutory fees therefor, since only the originals are on file.

HOWARDE K. PHILLIPS
Clerk

FILED
DISTRICT OF WYOMING
JUNE 17, 1981
WILLIAM C. BEAMON
CLERK

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF WYOMING

IN THE MATTER OF THE TAX INDEBTEDNESS OF HARVEY B. ANNIS BOX 5500 ALCOVA ROUTE CASPER, WY 82601	)))))	Docket No. MISC. 81-019

AFFIDAVIT OF REVENUE OFFICER

ROBERT J. VARRA

CITY OF CHEYENNE)
) ss
STATE OF WYOMING)

Revenue Officer Robert J. Varra, having been first duly sworn, states as follows:

1. I am the Acting Chief, Technical & Office Compliance Group employed in the Collection Division of the Office of the

District Director, Internal Revenue Service, at Cheyenne, Wyoming. As Acting Chief, Technical and Office Compliance Group, I am a revenue officer and also advise Revenue Officer Andrew S. Tagliavore. We have the duty and authority to collect federal taxes by seizure and sale under the provisions of Section 6331 of the Internal Revenue Code of 1954. In my capacity as Acting Chief, Technical & Office Compliance Group, I have been advised of the following by Revenue Officer Andrew S. Tagliavore, whom I know and believe to be a reliable source for this information.

2. An assessment of tax (penalty and interest to the extent applicable) for the years 1971, 1972 and 1973 has been made against Harvey B. Annis, Social Security Number 520-30-6699 in total amount of $38,073.14 for which notice and demand was

made on September 18, 1977 pursuant to Sections 6201, 6203 and 6303 of the Internal Revenue Code.

3. The said taxpayer has neglected or refused to pay the full amount of the tax assessed within 10 days after such notice and demand and this neglect or refusal continues.

4. There is now due, owing and unpaid with respect to such tax, penalty and interest a total amount of $37,361.41 plus statutory additions.

5. By reason of the assessment, a lien has arisen on all property and rights to property of said taxpayer as prescribed by Section 6321 and 6322 of the Internal Revenue Code of 1954 (26 U.S.C.).

6. By reason of the taxpayer's neglect and failure to pay such tax within 10 days after notice and demand, a levy may

be made on all property and rights to property belonging to the taxpayer or to which the federal tax lien attaches.

7. Mr. Harvey B. Annis is a farmer and rancher.

Liberty Providence Trust (Harvey B. Annis) is the owner of record of the property located at 5500 Alcova Route, Casper, WY 82601.

We observed on June 17, 1981, that the following items should be seized within the premises:

1. one dump truck;
2. two stake-rack trucks;
3. one hay bailer;
4. two house trailers;
5. one travel trailer;
6. other varied farm implements.

ROBERT J. VARRA
308 West 21st Street
Cheyenne, WY 82001

Subscribed and sworn to before me this 17th day of June, 1981.

GERTRUDE MC CUNE
Notary Public

My commission expires
April 22, 1982

GENERAL POWER OF ATTORNEY

STATE OF WYOMING)
COUNTY OF NATRONA)

KNOW ALL MEN BY THESE PRESENTS, that I JOHN JOSEPH AFFLERBACH, of Natrona County, Casper, Wyoming, do hereby make, constitute, and appoint CATHY WOLLARD of 1926 South Chestnut, Casper, Wyoming 82601, my true and lawful attorney-in-fact for me and in my name, place, and stead, and on my behalf, and for my use and benefit:

1. To ask, demand, sue for, recover, and receive all manner of goods, chattels, debts, rents, interest, sums of money, and demands whatsoever, due or hereafter to become due and owing, or belong to me, and to make, give, and execute acquittances, receipts, releases, satisfactions, or other discharges for the same, whether under seal or otherwise;

2. To make, execute, enorse, accept, and deliver in my name or in the name of my said attorney all checks, notes, drafts, warrants, acknowledgments, agreements and all other instruments in writing, of whatsoever nature, as to my said attorney-in-fact may seem necessary to conserve my interests;

3. To execute, acknowledge and deliver any and all contracts, deeds,

leases, assignments of mortgage, extensions of mortgage, satisfactions of mortgage, releases of mortgage, sub-ordination agreements, and any other instrument or agreement of any kind or nature whatsoever, in connection therewith, and affecting any and all property presently mine or hereafter acquired, located anywhere, which to my said attorney-in-fact may seem necessary or advantageous for my interests;

4. To enter into and take possession of any lands, real estate, tenements, houses, stores, or buildings, or parts thereof, belonging to me, that may become vacant or unoccupied, or to the possession of which I may be or may become entitled, and to receive and take for me and in my name and to my use all or any rents, profits, or issues of any real estate to me belonging, and to let the same in such manner as to my attorney shall seem necessary and proper, and from time to time to renew leases;

5. To commence, and prosecute in my behalf, any suits or actions or other legal or equitable proceedings for the recovery of any of my lands for any goods, chattels, debts, duties, demand, cause or thing whatsoever, due or to become due or belonging to me, and to prosecute, maintain, and discontinue the same, if she shall deem proper;

6. To take all steps and remedies necessary and proper for the conduct and management of my business affairs, and for the recovery, receiving, obtaining, and

holding possession of any lands, tenements, rents or real estate, goods and chattels, debts, interest, demands, duties, sum or sums of money or any other thing whatsoever, located anywhere, that is, are, or shall be, by my said attorney-in-fact, thought to be due, owing, belonging to or payable to me in my own right or otherwise;

7. To appear, answer, and defend in all actions and suits whatsoever which shall be commenced against me and also for me and in my name to compromise, settle, and adjust, with each and every person or persons, all actions, accounts, dues, and demands, subsisting or to subsist between me and them or any of them, and in such manner as my said attorney-in-fact shall think proper; hereby giving to my said attorney power and authority to do, execute, and perform and finish for me and in my name all those things which shall be expedient and necessary, or which my said attorney shall judge expedient and necessary in and about or concerning the premises, or any of them, as fully as I, the said John Joseph Afflerbach, could do if personally present, hereby ratifying and confirming whatever my said attorney shall do or cause to be done in, about, or concerning the premises, and any part thereof.

This instrument shall be construed and interpreted as a general power of attorney. The enumeration of specific items, rights, acts, or powers herein shall not limit or restrict, and is not to be construed or interpreted as limiting or restricting, the general powers herein granted to said

attorney-in-fact.

The rights, powers, and authority of said attorney-in-fact granted in this instrument shall commence and be in full force and effect on 1-23-85, and such rights, powers, and authority shall remain in full force and effect thereafter until I, John Joseph Afflerbach, give notice in writing that such power is terminated.

DATED: January 23, 1985.

JOHN JOSEPH AFFLERBACH

STATE OF WYOMING)
COUNTY OF NATRONA)

On January 23, 1985, before me personally came John Joseph Afflerbach, to me known to be the person described in and who executed the foregoing instrument and acknowledged that he had executed the same.

ARDELL M. BREED
Notary Public

My commission expires: January 19, 1988

ARDELL BREED - Notary Public
County of Natrona
State of Wyoming
My commission expires: Jan. 19, 1988

IN THE SUPREME COURT OF THE UNITED STATES

AFFLERBACH et al., Petitioners,)
v.) No. ------
UNITED STATES OF AMERICA)

DECLARATION OF SERVICE
28 U.S.C. 1746

I, Michael Cotton, of the County of Natrona, State of Wyoming and citizen of the United States, declare that:

1. I reside at 1353 Cody, Casper, Wyoming, 82604;

2. I am over the age of eighteen years of age and am the Declarant herein;

3. That on 5-15-85 I mailed, by United States mail, first class, pre-paid, ~~one copy~~ 3 Copies of the attached PETITION FOR WRIT OF CERTIORARI to each of the following:

REX LEE, Solicitor General of the
United States
United States Department of Justice
Washington, D.C. - 20530

RICHARD A. STACY, U. S. Atty.,
District of Wyoming
P. O. Box 668
Cheyenne, Wyoming - 82003

4. All parties required to be served have been served;

5. There is regular communication between the place of mailing and the places so addressed.

I declare, under penalty of perjury that the foregoing is true and correct.

Executed on May 15, 1985.

SIGNED: Michael D. Cotton
MICHAEL COTTON, Declarant